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In the Supreme Court of Canada.

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APPEAL

FROM THE SUPREME COURT OF BRITISH COLUMBIA.

Between

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
ALPHEUS P. BOYD, JAMES A. McLELLAN, SAMUEL A.
DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
ELIZABETH H CUTTER,
PLAINTIFFS, APPELLANTS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA-
TION COMPANY, LIMITED, and THE MOODYVILLE SAW-
MILL COMPANY, LIMITED, DEFENDANTS, RESPONDENTS.

THEODORE DAVIE,
Solicitor of Appellants.

DAVIE & POOLEY,
Solicitors of Respondents, the B. C. Towing Co.

DRAKE & JACKSON,
Solicitors of Respondents, the M. S. S. Co.

OTTAWA AGENTS:

LOCKBURN & WRIGHT,
For Appellants.
L. N. BENJAMIN,
For Respondents.

VICTORIA:
DAILY COLONIST PRINT.
1882.

APPEAL

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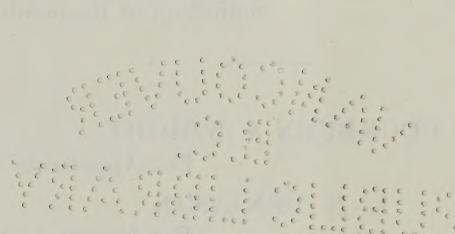
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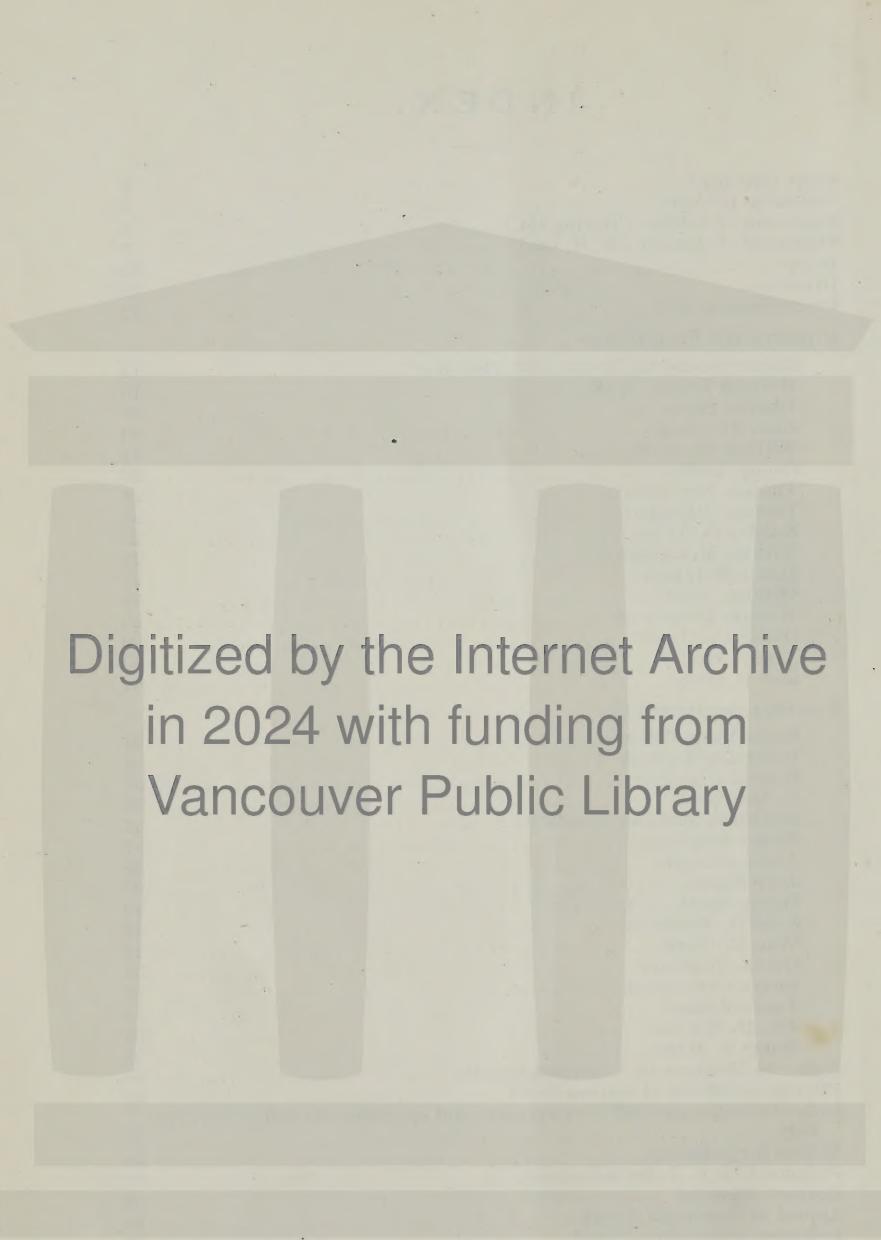
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IN THE

SUPREME COURT OF CANADA.

BETWEEN

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
ALPHEUS P. BOYD, JAMES A. McLELLAN, SAMUEL A.
DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
ELIZABETH H CUTTER,

PLAINTIFFS, APPELLANTS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA-
TION COMPANY, LIMITED, and THE MOODYVILLE SAW-
MILL COMPANY, LIMITED,

DEFENDANTS, RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF BRITISH COLUMBIA.

This is an appeal to the Supreme Court of Canada, from the judgment of the Supreme Court of British Columbia, coram Begbie, C. J. and Crease, J., (Gray, J. dissenting) dismissing the plaintiff's appeal from the judgment of the Chief Justice in favor of the respondents rendered in the cause on the 11th day of July, 1881:

PLEADINGS.

THE PLEADINGS ARE AS FOLLOW:

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
ALPHEUS P. BOYD, JAMES A. McLELLAN, SAMUEL A.
DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
ELIZABETH H. CUTTER,

PLAINTIFFS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA-
TION COMPANY, LIMITED, and THE MOODYVILLE SAW-
MILL COMPANY, LIMITED,

DEFENDANTS.

STATEMENT OF CLAIM.

1. The plaintiffs are ship owners residing at Bath, Maine in the United States of America.

2. The defendants "The British Columbia Towing and Transportation Company, Limited," hereinafter called the Towing Company, are a joint stock company having their

registered office at Victoria, British Columbia; such company is carried on for the purpose of acquiring profits by the towing of ships in British Columbia waters, and own the steam-tug "Beaver," hereinafter mentioned. The said Towing Company did so own the "Beaver" on the 21st May, 1880, and from thence to the time of the loss of the "Thrasher."

3. The defendants "The Moodyville Saw-Mill Company, Limited," hereinafter called the "Saw-Mill Company" are a company incorporated under an Act of the British Columbia Parliament passed in 1878, intituled "An Act to incorporate the Moodyville Saw-Mill Company, Limited," and own the steam-tug "Etta White" hereinafter mentioned, which steam-tug is used and employed by the said Saw-Mill Company in towing ships for reward. 10 Such was the case at the time of the towing and loss of the "Thrasher" and at that time Henry Smith was master of the "Etta White," appointed as such master by the Saw-Mill Company.

4. On the 21st May, 1880, and from thence to the loss of the same the plaintiffs were owners of the American ship "Thrasher" of the burthen of 1514 tons registered tonnage, which said ship on the said 21st May, 1880, in command of the plaintiff Robert Bosworth arrived at Royal Roads in ballast bound on a voyage to Nanaimo there to load with coal for San Francisco.

5. The "Thrasher" being in need of a tug-boat to tow her to Nanaimo, the master of the said ship, the said Robert Bosworth, on the 22nd May, 1880, entered into a verbal 20 agreement with Henry Saunders as agent for and on behalf of the Towing Company for the services of a tug-boat to tow the "Thrasher" to Nanaimo and so soon as she was loaded to tow her to Cape Flattery, the said service was to be performed for the sum of \$600.

6. In pursuance of the said agreement the Towing Company towed the "Thrasher" to Nanaimo with the said steam-tug the "Beaver."

7. The "Thrasher" finished loading at Nanaimo and was ready for sea about the 13th July, 1880, and shortly before that time the said Robert Bosworth wrote to the said agent, Henry Saunders, for a tug to tow the "Thrasher" to Cape Flattery in pursuance of the said contract mentioned in the 5th paragraph. The "Thrasher" was loaded with 2600 30 tons of coal and drew twenty-four feet of water and the master the said Robert Bosworth asked that he might have the steam-tug "Alexander" if available. The said steam-tug "Alexander" was a very powerful boat and under the control of the Towing Company and used by them in their said towing business.

8. The said Henry Saunders wrote to the said Robert Bosworth stating that the "Alexander" was not available but that in place of the "Alexander" he would send the two tug-boats "Pilot" and "Beaver."

9. Neither the "Pilot" nor the "Beaver" were ready to tow the "Thrasher" on the 13th July when she had completed loading and was ready for sea, but in the evening of that day the said steamer "Etta White" came to Nanaimo and the said master of the 40 "Etta White," the said Henry Smith, informed the master of the "Thrasher," the said Robert Bosworth, that he had been sent up to tow the "Thrasher" down.

10. The said Robert Bosworth objected to the "Thrasher" being towed by the "Etta White" alone as he knew nothing about her power.

11. On the 14th July, 1880, the "Beaver" arrived at Nanaimo in charge of James Christensen, the master of the said "Beaver" appointed by the Towing Company to that position, and at about 7 o'clock P.M. took the hawser of the "Thrasher" and the "Etta White" passed her hawser to the "Beaver" and the two tug-boats with the consent of the said master of the "Thrasher" commenced to tow the "Thrasher" down the Straits of Georgia towards Cape Flattery, the "Etta White" being the foremost tug.

12. The said masters of the steam-tugs "Etta White" and "Beaver" at the time of the said towage service, as the said Robert Bosworth knew, were both licensed pilots for the locality in which they were towing but they were engaged voluntarily by the owners of the "Etta White" and "Beaver" respectively as masters of the said tugs. 10

13. No direction as to the course was given by the master of the "Thrasher" or by any one on behalf of the tow to the tugs or either of them or to any on board other than a general direction to tow to Cape Flattery. In fact there was no pilot on board the "Thrasher" as the masters of the tugs knew; the master of the "Thrasher" Robert Bosworth and all on board were strangers in the waters where the towing was taking place (as the said masters of the tugs also knew) and did not attempt to direct the course for the tugs to pursue but the course was left entirely to the tugs and those commanding them.

14. The tugs did not tow the "Thrasher" in a safe course.

15. At the commencement of the towage the weather was clear and calm. At about 20 ten o'clock P.M. on the said 14th July, the weather continuing the same and a bright starry sky prevailing, without previous indication of danger, the tugs, through the negligence, carelessness and unskilfulness of the masters and mariners of the same, dragged the "Thrasher" on a reef of rocks known as Gabriola Reef situated in the Gulf of Georgia.

16. The value of the "Thrasher" at the time of the disaster was \$75,000, and by reason of the premises she became and was a total wreck, and was and is completely lost to the plaintiffs together with her cargo.

17. The plaintiffs have expended divers and large sums of money in fruitless endeavors to remove the ship from the said reef of rocks, have lost large profits which would have accrued to them by sale of the cargo of the ship, and have been otherwise injured. 30

The plaintiffs claim the following relief:

1. \$80,000 damages.
2. Such further relief as the nature of the case may require.

The plaintiffs propose that this action be tried at the town of Nanaimo.

Delivered the 4th day of March, A. D. 1881, by

THEODORE DAVIE,

Of Langley Street, Victoria,

Plaintiff's Solicitor.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
 ALPHEUS P. BOYD, JAMES A. McLELLAN, SAMUEL A.
 DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
 ELIZABETH H CUTTER,

PLAINTIFFS, APPELLANTS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA-
 TION COMPANY, LIMITED, and THE MOODYVILLE SAW-
 MILL COMPANY, LIMITED,

DEFENDANTS, RESPONDENTS.

10

STATEMENTS OF DEFENCE.

1. The defendants, "The British Columbia Towing and Transportation Company, Limited," hereinafter called the said company, do not admit that the plaintiffs, or any, or either of them are ship owners residing at Bath, Maine, in the United States of America, as they have no means of knowing the truth of the plaintiff's allegation.
2. As to the allegations in paragraph three of the statement of claim the said company do not admit them and are not concerned therewith.
3. The said company do not admit that the plaintiffs, or any, or either of them were the owners of the American ship "Thrasher" on the 21st day of May, 1880, or at the time 20 of the loss of the said ship, or that the said ship was of the burthen of 1514 tons, or of what burthen, as they have no means of knowing the truth of the allegations.
4. The said company deny the agreement of towage as alleged by the plaintiffs in the fifth paragraph of their statement of claim, and say that the agreement made between Captain Bosworth, the master of the said ship "Thrasher," and Henry Saunders, the agent of the said company, was as follows: "On or about the 22nd day of May, 1880, Robert Bosworth, the master of the said ship, being desirous of proceeding to the port of Nanaimo, came to Victoria, British Columbia, and called upon one, Henry Saunders, the agent of the said company, and then and there entered into an agreement with the said company for the services of a steam tug to take the said sailing vessel from Royal Roads 30 to Departure Bay, Nanaimo, aforesaid, and from Departure Bay, aforesaid, to Race Rocks or Cape Flattery after the loading of the said vessel for the sum of \$500 if the said ship was towed to Race Rocks, and \$600 if towed to Cape Flattery. The said Henry Saunders was to send up the steam tug "Alexander" if he could obtain the services of the same or otherwise to send another tug to assist the "Beaver" in towing the said "Thrasher" from Nanaimo when loaded. The said Robert Bosworth was a stranger on the coast and when the said agreement was made the said Henry Saunders advised that the said master should engage the services of a pilot for the purpose of navigating his ship during the performance of the agreement and the said Robert Bosworth agreed to do so.
5. In pursuance of the terms of the agreement the said Robert Bosworth took a pilot,

by name, Andrew Rogers, a duly licensed pilot of the port of Nanaimo on board his said ship "Thrasher" at Victoria, and the said company towed the said "Thrasher" to Nanaimo with the steam tug "Beaver."

6. The said company admit that the said Robert Bosworth did previously to the 13th day of July, 1880, write to Henry Saunders to send the steam tug "Alexander" to tow the "Thrasher" to sea if she was available. The said company deny that the steam tug "Alexander" was under their control or used by them in their towing business, but the said company did from time to time make arrangements for the use of the said "Alexander" as business required.

7. The said company admit that the said Henry Saunders wrote to the said Robert 10 Bosworth stating that the "Alexander" was not available, but do not admit that he promised to send the tug boats "Pilot" and "Beaver" or any particular tugs, but he promised to send two tugs.

8. The said company admit that the tug "Pilot" was not available to tow the said "Thrasher" from Nanaimo on the 13th day of July, 1880, and in consequence thereof the said Henry Saunders made arrangements with the owners of the "Etta White" to send her over to Nanaimo to assist the "Beaver" in towing the said ship "Thrasher" out of Nanaimo.

9. On the 14th day of July, 1880, the steam tug "Beaver" arrived at Nanaimo in charge of James Christensen, the master of the said "Beaver" appointed by the towing company to that position; and at about seven P. M. the "Thrasher" started on her voyage in tow of the said steam tugs "Etta White" and "Beaver," the "Etta White" taking the lead; the said "Etta White" passed her hawser to the "Beaver" and the said "Beaver" passed her hawser to the "Thrasher," but the master of the said vessel did not in accordance with the terms of his agreement with the said Henry Saunders take the services of a pilot to assist him in directing the course of the said vessel and steam tugs from the port of Nanaimo to Cape Flattery as aforesaid, though one or more qualified pilots tendered their services to the said master just previously to his starting from Nanaimo in tow of the said steam tugs as aforesaid.

10. At Nanaimo there is an organization of lawfully qualified pilots, one or more of whom offered his services to the master of the said "Thrasher" before the vessel left the port of Nanaimo, but the said master refused and declined to accept the services of the said pilot (notwithstanding his agreement aforesaid with the said Henry Saunders) and took upon himself the whole care and responsibility of navigating the said "Thrasher" from Nanaimo to Cape Flattery and directing the course of the said tugs, and the company allege that the said master of the said "Thrasher" was guilty of great negligence and carelessness in attempting to proceed from Nanaimo to Cape Flattery without the assistance of a qualified pilot.

11. The said company deny that James Christensen, the master of the said tug "Beaver" was at the time of the alleged accident a licensed pilot of the port of Nanaimo, 40 the locality in which the said ship "Thrasher" was being towed, and also deny that the master of the "Etta White" was a licensed pilot; of these facts, the said Robert Bosworth was well aware or if not aware could have become acquainted therewith by simple enquiry.

12. The master of the "Beaver" was aware that there was no pilot on board the said ship "Thrasher" at the time of commencing to tow from Nanaimo, as aforesaid, from the fact that the master of the said ship "Thrasher" stood upon the poop of his said ship and gave orders to the master of the said tug "Beaver;" and the said company deny that the master of the said ship "Thrasher" did not attempt to direct the course of the said tugs, and that the course was left entirely to the tugs and those commanding them.

13. The said company deny the allegations of the plaintiffs in the fourteenth paragraph of their statement of claim, and say that the steam tug "Beaver" did tow the "Thrasher" in a safe course.

14. The said company admit that at the commencement of the towage the weather 10 was clear and calm and continued fine and clear, but the said company deny that through the negligence, carelessness and unskilfulness of the masters and mariners of the said tugs, the said "Thrasher" was dragged on a reef of rocks known as Gabriola Reef situated in the Gulf of Georgia or any other known rock or reef. The tug "Beaver" was towing ahead of the said ship "Thrasher" with 100 fathoms of hawser, and the tug "Etta White" was towing ahead of the said "Beaver" also with 100 fathoms of hawser, and the said "Beaver" and "Etta White" having steered a correct course from Nanaimo through the Fairway channel, rounded the lighthouse and then due east by compass past the Flat Top Islands proceeded on their course to the northward of Gabriola Reef, then distant half a mile and upwards. The tug "Etta White" then changed her course east south east, 20 the tug "Beaver" still continuing her easterly course, but the helm of the said ship "Thrasher" was put to port and she was directed towards the Etta White instead of following the tug Beaver, the steamer next to her; this brought the Beaver a point or a point and a half on the port bow of the Thrasher, and in consequence the said ship Thrasher struck against an unknown and sunken rock lying to the north of Gabriola Reef and distant more than half a mile from the beacon on Gabriola Reef, and which said rock is not laid down on any authorized chart of the said coast; whereas if the said master had followed the course steered by the Beaver no such accident could have happened and the said company are in no way to blame for the carelessness and want of skill of the master of the said ship Thrasher which was the cause of the accident. 30

15. The said company do not admit that the value of the said ship Thrasher at the time of the disaster was of the value of \$75,000 or any other sum, as they have no means at their disposal of knowing the value of the said vessel. They admit that she became a total wreck but not through the unskilfulness, negligence or carelessness of the said company.

16. The said company do not admit that the plaintiffs have expended divers and large sums of money in fruitless endeavors to remove the said ship from the rocks, and the said company deny that the plaintiffs lost large or any profits which would have accrued to them by sale of the cargo of the ship Thrasher.

17. The master or officer in charge of the Thrasher was in fact in command of both tugs and ship, and was responsible for the course, direction and navigation of the said 40 tugs.

18. The said company further say that the said master of the Thrasher contributed to the loss of the said vessel by his negligence in not taking a pilot in pursuance of the terms of the agreement aforesaid, and that the plaintiffs cannot therefore recover against the said company in this action.

19. The said company further say that the said master of the said ship Thrasher caused the loss of the said vessel by his negligence in not following directly in the course of the steam tug Beaver, and that therefore the plaintiffs cannot recover against the company in this action.

20. The said company further say that if they did tow the said ship Thrasher on to any rock it was an unknown rock not laid down on any authorised chart, and that it was an inevitable accident, and that therefore the plaintiffs cannot recover in this action.

21. The said company say that by the law of Canada which regulates and governs the law of ships and shipping navigating Canadian waters that the owners of any ships where any loss or damage is by reason of the improper navigation of such ship, as aforesaid, caused to any other ship or boat shall not be answerable in damages in respect of loss or damage to ships, boats, goods, merchandize, or other things to an aggregate amount exceeding \$38.92 for each ton of the ship's registered tonnage, where such loss or damage occurs without their actual fault or privity, and without in any way admitting that they are responsible for the alleged loss of the said ship Thrasher, the said company claim that the amount of damages, if any, recoverable against the said company must be limited to \$38.92 per ton of the gross tonnage of the steam tug Beaver, and the said company further say that the gross tonnage of the said steam tug Beaver, without making any deduction for engine room is 159.12 tons.

Delivered the 12th day of April, A. D. 1881.

20

CHAS. E. POOLEY,
Solicitor for B. C. T. and T. Co., Limited.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
ALPHEUS P. BOYD, JAMES A. MCLELLAN, SAMUEL A.
DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
ELIZABETH H CUTTER,

PLAINTIFFS, APPELLANTS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA- 30
TION COMPANY, LIMITED, and THE MOODYVILLE SAW-
MILL COMPANY, LIMITED,

DEFENDANTS, RESPONDENTS.

STATEMENT OF DEFENCE OF THE DEFENDANTS, THE MOODYVILLE SAW-MILL COMPANY, LIMITED.

1. The defendants, "The Moodyville Saw-Mill Company, Limited," do not admit that the plaintiffs or any of them were on the 21st of May, 1880, the owners of the American sailing ship Thrasher.

2. The defendants admit that the master of the said ship, Robert Bosworth, on the 22nd May, 1880, or at some other time to the defendants unknown entered into a contract with Henry Saunders as agent for and on behalf of the Towing Company for the services of a tug boat to tow the Thrasher to Nanaimo and when loaded to tow her to Cape Flattery for \$600, but the defendants say that the said Henry Saunders insisted on the said ship Thrasher taking a pilot from Royal Roads to Nanaimo, and it was understood that when loaded and ready for sea the said vessel would be under the charge of a pilot.

3. The defendant's tow boat Etta White being at Nanaimo on the 14th June, 1880, offered her services to the said Robert Bosworth to tow his vessel from Nanaimo to Royal Roads, but the said Robert Bosworth declined to engage the said Etta White, stating 10 that he had entered into a contract with Mr. Saunders, of Victoria, to tow him out, and that he was waiting for a tug from him. The tug Beaver shortly afterwards arrived at Nanaimo and before proceeding to take the Thrasher in tow the master of the Beaver engaged the tug Etta White to assist him, and the defendants admit that when the Thrasher was ready for sea the tug Beaver passed her hawser to the Thrasher, and the Etta White passed her hawser to the Beaver and steamed ahead of the Beaver.

4. The defendants deny that the master of the tug Etta White was a licensed pilot, as alleged, or was entitled or authorised to pilot vessels in Nanaimo Pilotage District, or in any other pilotage district of British Columbia, and the defendants allege that at Nanaimo there is an organization of lawfully qualified pilots, one of whom offered his services 20 to the master of the Thrasher before that vessel left the port of Nanaimo, but the said master refused and declined to accept the services of the said pilot, and did not in fact take any pilot, although he had been advised not to sail without one, and his sailing without a pilot was contrary to the understanding mentioned in the second paragraph hereof. The defendants submit that the master of the said Thrasher, by the fact of sailing from Nanaimo without a pilot, was guilty of great negligence and carelessness and thereby contributed to the accident.

5. The defendants deny that the Thrasher was, through the carelessness and unskillfulness of the said defendants dragged against the reef known as Gabriola Reef, for these defendants say that the tug Beaver was towing ahead of the said ship Thrasher with one 30 hundred fathoms of hawser and the tug Etta White was towing ahead of the said Beaver, also with one hundred fathoms of hawser, and the Etta White having steered a correct course from Nanaimo through the Fairway Channel rounded the lighthouse and then steered due east by compass, proceeded on her course, passed the Flat Top Islands to the northward of Gabriola Reef then distant half a mile and upwards. She then changed her course east south east, the Beaver still continuing her easterly and proper course, but the Thrasher's helm was put to port and she was directed towards the Etta White, this brought the Beaver a point or a point and a half on the port side of the Thrasher, and in consequence of the Thrasher not following the tug next to her she, the Thrasher, struck against an unknown and sunken rock lying to the north of Gabriola Reef and distant 40 more than half a mile from the beacon on Gabriola Reef, whereas if the said Robert Bosworth had followed the course steered by the Beaver no such accident could have happened, and the defendants submit to the court that they are in no way to blame for the carelessness, negligence and want of skill and care of the master of the ship Thrasher so steering as aforesaid, nor for the unknown dangers of the seas and navigation.

6. The defendants allege that the course taken by the Etta White was in accordance with the sailing directions of the Vancouver Pilot, being the highest and lawful authority, and was a proper course for such a voyage.

7. The defendants do not admit that the value of the Thrasher was \$75,000, and are unacquainted with her value, and they deny that she became a total wreck or that she was completely lost to the plaintiffs.

8. The master of the Thrasher was in command of both tugs and ship, and during the towage service gave orders to the tugs and to the steersman on board the Thrasher, and the said tug Etta White obeyed all orders she received from the master of the Thrasher or the Beaver, and the defendants submit that the alleged injury to the said 10 Thrasher was solely due to the negligence, carelessness and want of skill of the said master.

9. The defendants further say by way of alternative defence that the rock on which the Thrasher struck is not part of Gabriola Reef, as laid down on the official charts, but is a detached rock not noticed or marked on any chart, lying six cables N. by E. distant from the said reef, and the defendants allege that according to the sailing directions contained in Vancouver Island Pilot, the rock on which the Thrasher was wrecked, lies in the course laid down in the sailing directions for clearing Gabriola Reef.

10. The defendants further submit that the master of the Thrasher, by his negligence, contributed to the loss of the said vessel beyond the power of the defendants to remedy, 20 and that the plaintiffs cannot therefore recover against the defendants in this action.

11. The defendants say that by the law of Canada which regulates and governs the law of ships and shipping navigating Canadian waters that the owners of any ship (where any loss or damages is by reason of the improper navigation of such ships, caused to any other ship or boat) shall not be answerable in damages in respect of loss or damage to ships, boats, goods, merchandize, or other things, to an aggregate amount exceeding \$38.92 for each ton of the ship's registered tonnage, where such loss or damage occurs without their actual fault or privity, and without in any way admitting that they are responsible for the alleged loss of the Thrasher, the defendants claim that the said loss alleged occurred without their actual fault or privity and that the amount of damages, if 30 any, to be recovered against the said defendants must be limited to \$38.92 per ton of the registered tonnage of the said tugs, and that the gross registered tonnage of the said tug is 97.35 without any deduction for engine room.

Delivered this 11th of March, 1881.

ROBERT EDWIN JACKSON,
Solicitor for the Moodyville Company, Victoria.

REPLY.

IN THE SUPREME COURT OF BRITISH COLUMBIA.

BETWEEN

ARTHUR SEWELL, ROBERT BOSWORTH, JOSEPH SMALL,
 ALPHEUS P. BOYD, JAMES A. MCLELLAN, SAMUEL A.
 DINSMORE, THOMAS A. REED, HARRIET H. CUTTER and
 ELIZABETH H. CUTTER,

PLAINTIFFS,

AND

THE BRITISH COLUMBIA TOWING AND TRANSPORTA-
 TION COMPANY, LIMITED, and THE MOODYVILLE SAW- 10
 MILL COMPANY, LIMITED,

DEFENDANTS.

The plaintiffs join issue upon the respective statements of defence of both defendants.

The plaintiffs demur to so much of the statement of defence of the towing company as is contained in paragraph twenty thereof, and to so much of the Saw-Mill Company's statement of defence as is contained in paragraph eleven thereof, and say that the same in each instance is bad in law on the following grounds:

1. That the limitation claimed does not apply to cases of negligent towage or to damages for breach of contract.

2. The amount of which it is claimed the liability should be limited, is not brought into court and no offer is made to pay or secure the same. 20

3. The defence does not include interest on the limited amount since the loss of the ship.

4. It is not shewn that the tugs are registered, and on other good and sufficient grounds, sufficient in law to sustain this demurrer.

Delivered this 29th day of April, 1881, by

THEODORE DAVIE,
 Of Langley Street, Victoria, Plaintiff's Solicitor.

The defendants duly joined in demurrer.

By a judge's order the issues of fact were directed to be tried first, and such trial took place on the 26th, 27th and 28th days of June, 1881. 30

The evidence and proceedings at the trial were reported in short hand and the following is a synopsis of such evidence:

Robert Bosworth, duly sworn, (evidence taken on commission by judge's order)—I was formerly master of the ship Thrasher; she belonged to Bath, State of Maine, U. S.; she was an American Register; I produce certificate of register (marked A); this is a

second register made out in Baltimore; this is the last register. At the time of the loss of the ship the owners were the same as in the register with the exception of two deceased. The deceased were three, William C. Sewell, Edward Sewell, Charles Crooker. I had at the time of the loss of the ship purchased the interest of Alice S. Cutter; with these four exceptions the owners were the same as on the register; I bought Alice S. Cutter's share for about ten thousand two hundred dollars; I paid about five thousand dollars down. The ship was only insured to the extent of five thousand dollars on my interest for the purpose of securing the balance of the purchase money. I arrived in Royal Roads 21st May, 1880, about eleven p. m.; the ship anchored in Royal Roads; she was from San Francisco bound to Nanaimo for coals. I anchored in Royal Roads for the purpose of 10 getting a tug to take the ship the balance of the way; next morning the 22nd I came to Victoria; I went to Mr. Saunders, the agent of the tug boats in Victoria and made a verbal agreement; the agreement was to tow the ship to Nanaimo and after she was loaded thence to Cape Flattery for six hundred dollars. Mr. Saunders gave me the tug Beaver to tow up. I do not remember whether I informed him of the tonnage of my ship. I may have done so. He said, in all probability the Alexander would be available when I was ready to be towed to sea. On going up I engaged a pilot. I asked Mr. Sunders if it was necessary to engage a pilot; he said as a general thing it was not customary to take one. He said Captain Warren of the Beaver was a man they put great confidence in. He said he thought as I was a stranger and it was possible I might break adrift that it 20 was advisable for me to take a pilot; I got to Nanaimo without any trouble, being towed by the Beaver. We lay at Nanaimo about eight weeks getting loaded. Before I got ready for sea I wrote Mr. Saunders, I told him I was nearly ready for sea and if the Alexander was available I insisted on having that boat; that after my long detention in loading I did not care to have any further delay in having an inferior boat, or to the above effect. I received an answer to this letter which I have lost. He gave me to understand the Alexander was not available, but he would in place of sending the Alexander send me the two boats "Pilot" and "Beaver." I notified Mr. Saunders twenty-four or forty-eight hours by telegraph before I was loaded. I finished loading I think on Tuesday noon the 13th July. There was no boat ready until about five o'clock that even- 30 ing. Instead of the Beaver or Pilot the Etta White came up. The Alexander was sent the same day to take a ship out of Departure Bay. I saw the captain of the Etta White; he said he had been sent up to tow me down; it was Captain Smith; I objected to being towed down by his boat as it was not the boat which I had been promised and I knew nothing about the power of his boat. He tried to persuade me to go and said he could do as well as either of the other two tugs by themselves singly. The weather was fine and he thought there would be no trouble in taking the ship down, but I still objected. Later in the evening he came on board my ship and urged me still further to go; I told him I did not consider myself justified in risking such a large amount of property with a boat as small as his was, and finally finished by saying I 40 would not go until I had got the second boat; he thought they would be sending the Beaver up and we would meet her on the way. I still refused to go. I kept Captain Smith waiting twenty-four hours until the Beaver came up which she did in charge of another ship. She took in her coal and as soon as she was ready she took my hawser. Both the Captain of the Etta White and Captain Christensen of the Beaver came on board my ship prior to this; Captain Smith expressed some annoyance at being detained so long. Captain Christensen gave me to understand that as soon as he got his coal in he was ready to proceed with the ship. Previous to this Captain Smith told me he had received a telegram from Mr. Saunders saying that the Beaver was on her way up to take

the ship in tow with the Etta White. After the Beaver had taken my hawser the Etta White passed her hawser to the Beaver; we started, the Etta White being in the lead; I think we started about 7 o'clock P. M. on the 14th July. The weather was fine and no wind and good daylight at the time; the sky was clear; I had no pilot; there was no conversation between myself, the captain's of the tugs, or any one on board them about a pilot. I had my full complement of a crew except carpenter; I had sixteen men besides officers: two officers, 1st and 2nd mate, cook and steward, twenty-one including myself. The tugs took the ship directly out of the harbor by Light House Island; I set a regular sea watch about eight o'clock, an officer of the deck and eight men. I told the man at the wheel to steer directly after the steam tugs; no course by compass was given. We proceeded alright till somewhere about ten o'clock, the weather continuing the same, night clear and starlight, what is generally considered here a remarkably fine night; it was perfectly calm, hardly a ripple; the ship having been steered and still steering directly after the steam tugs, without any warning whatever struck with a heavy crash which shook her from stem to stern on what is called Gabriola Reef; I had just gone below probably gone below ten minutes. I immediately rushed on deck and forward onto the top-gallant forecastle. I observed that the ship had risen out of the water forward to a considerable extent and was hard and fast. The Etta White was some distance ahead having parted her hawser, the Beaver was still towing; I sounded with the lead forward and found sixteen or nineteen feet of water; I hailed the Beaver and 20 at the same time gave orders to sound the pumps. I asked the captain where he had got the ship to. He replied that she was on Gabriola; I asked him how he got her there; he said he or they had hauled to too quick. I asked him what he thought of doing. He suggested getting out a hawser aft which was immediately done, but continually sounding and using the pumps with all hands I found the water was gaining so rapidly that I thought it unsafe to tow her off the rock into deep water. I felt certain that if she were towed off the rock she would sink. I kept all hands at the pumps until I found it was useless then gave orders to shift the valuables from aft to forward. We had two pumps going. Capt. Smith came alongside in the Etta White; I asked him if he could account for the ship getting there; he said no he could not; at the time I ordered the valuables 30 forward the ship was going down rapidly; I then proposed to Captain Smith to take me to Nanaimo as I wanted to report the ship on the reef to my owners and see if I could get some assistance. I went to Nanaimo in the Etta White; the Beaver stayed by the ship; I hunted up Mr. Bate, the agent of the Vancouver Coal Company and notified him, and Bate, and Capt. Johnson of the Belvidere returned to the ship. We got back to the ship about four o'clock in the morning. The ship had sunk down on the bottom and when the tide came in again it flowed so as to cover the entire after end of her. Plan of ship as she appeared marked B. produced: at high water (1) at low water (2); it was about low water when I got back to the ship; at that time the water was flowing over the starboard rail; she had a strong list to starboard and rested heavily on her starboard bilge; when I got back I had about 40 made up my mind the ship would be a total loss; Capt. Johnson was with me and this was his opinion also; I set my people to work unbending sails, &c., and saving stuff from the wreck which I placed on board the Beaver; about noon the steamer Victoria came up and Capt. Heyward came alongside in his boat; he was also of opinion that the ship could not be saved; the rest of the day I spent in saving what I could; towards night I started in the Etta White to go to Nanaimo; on the way I met Mr. Peck, the receiver of wrecks; he volunteered to assist; we went to Nanaimo together, got a barge from the Douglas and assistance from the ships, I mean men; we returned that night to the wreck; arrived early in the morning and went to work wrecking the ship, saving what we could; about noon

that day I started for Victoria, being of opinion that the ship might yet be saved; at this time the starboard rigging was slackened up from which I feared the starboard bilge was badly strained, in which case there was very little hope of saving the ship; it had been so almost from the first; I was in hopes, however, that the bilge was not badly strained; I was in hopes that by getting assistance from the navy, divers and powerful pumps, I would be able to use the pumps at low tide so effectually as to enable me to control the water before the rising of the tide and so the ship would float with the tide, as the tides at that time were on the increase. I called on the American Consul with Messrs. Rithet and Peck and proceeded with them to the Admiral's house and solicited his aid. The Admiral sent up the gun vessel Rocket with four marine divers and steam pump; I also 10 employed a Cameron steam pump to make this aid more efficient; the engineer of the Etta White engaged the pump and I paid for it. After some short delay the Rocket and all these materials arrived at the scene of the wreck; after the arrival of the Rocket I went on board to consult the captain of the Rocket; he said the work he was going to do on the ship he wanted to have the sole control of the work himself; the work commenced about the 19th or 20th of July; I don't vouch for the accuracy of the dates in the log; the plans of the captain of the Rocket for going to work to save the vessel coincided with mine; we commenced in the first place with sending the divers down to make an examination; their report was that they were not able to tell much about the starboard bilge where the ship rested so heavily; as far as the damage forward they thought they could 20 patch up the damage there if that was the only damage we could succeed in pumping her out. They patched it up with lead, canvass, and felt, and material I had purchased in Victoria for this purpose. We got the pumps in order, to work, both the Cameron pump and the navy pump. We set gangs to work shovelling out coal forward at same time; the first day's work was ineffectual; the second day we closed up the after hatch and we closed up the after scuttle in which we had the hose the previous day, leaving the after scuttle water tight with room for the hose to go down so that we could pump there after the water had gone over the hatch. The result was we could not perceive any gain on the water. We pumped from about seven until at noon when the pumps were submerged and we could not work any longer. This same day we had both the main pumps rigged 30 and working with all hands we could get. The third day we worked as hard as we could but came to the conclusion that the appliances were not sufficient. Captain Smith during the third day said it was no use and my friends considered I was throwing away my time by working any further. The divers went down each day in succession and stopped up the hole. They reported they had done all they could but had not succeeded in stopping the leak forward satisfactorily as they expected to at first. I concluded that the only thing for me to do was to dispose of the wreck to the best advantage which was subsequently done; she realized, ship and cargo, \$520. The value of the gear saved, that is what it brought, was about thirty-four hundred dollars (\$3400) at auction sale and private sale. The expenses of trying to save the ship amounted to about fourteen hundred dollars (\$1400). The value of the ship at the time of her loss was worth eighty thousand dollars (\$80,000). She was built in 1876; her cost in building exceeded eighty thousand dollars. Her tonnage was 1512 and her value \$55 per ton, at which rate I bought in her. The particulars in the certificate of register are correct; log produced of ship Thrasher marked C. William C. Sewell deceased was the father of Arthur and Edward Sewell who 40 were brothers.

ROBT. BOSWORTH.

[Witness]. Henry S. Mason.

Herman Larsen, sworn.—I am an able seaman; I was employed on board the ship Thrasher; I remember when the Thrasher left Nanaimo in tow of the two steamers; when

we started it was fine clear weather, about seven o'clock p. m. I went to the wheel at eight o'clock the watch was then set; my orders were to keep after the steamers; I had been at the wheel about an hour and a half before we struck. The ship struck and the captain went forward on the top-gallant forecastle he asked the steamer where he was taking us to, but I was that far back I could not hear the answer. The captain was below at the time the ship struck; he had been below about ten minutes or a quarter of an hour; before that he had been on deck from the time we left Nanaimo. I stayed at the wheel; we got out a hawser aft and all hands to the pump. The water increased. The Beaver endeavored to tow the ship astern but did not move her; she was hard and fast; they still went on pumping; when they saw the water was gaining they stopped towing astern. I 10 heard the captain and second mate say that if they towed her off she would sink in deep water. The crew were set to work carrying stuff out of the cabin forward. We were a long while at the pumps, but I cannot say how long. The captain went off to Nanaimo in the Etta White; all hands stopped on board. The water continued to rise over the ship. The captain returned at daylight the following morning. The stern of the ship was then under water; she laid over to starboard like No. 2 in the plan B., after the stern of the ship was under water we commenced taking our clothes on the steamer. As soon as the captain returned, at his orders, we unbent the sails and tried to save all we could on board the ship. The weather was the same as when we started when the ship struck. It was not dark at the time the ship struck.

HERMAN LARSEN.

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FRIDAY, 29th Oct., 1880.

Herman Larsen, cross-examined by Mr. Pooley.—I was placed at the wheel when the watch was set at eight o'clock in the evening on which the ship Thrasher was being towed by the tugs Beaver and Etta White. The mate set the watch; I suppose he got orders from the captain. Young, the second mate, was officer of the watch; the first mate set the watch. The name of the first mate is Carter. There was a lookout placed forward in the vessel, his name was Albert Oldberg; when I was placed at the wheel there was no particular course given me to steer. The captain directed me to steer after the Etta White because the Beaver was an old boat and did not steer very well. I followed the instructions given by the captain and steered after the Etta White. An hour and a half 30 after the watch was set, at eight o'clock, the Thrasher struck. About an hour and a quarter after the watch was set the captain remained on deck. He then went down in the cabin. It was a fine clear night. I did not see any haze hanging along the shore; we could see the land all along. I could see the tow boats very distinctly. The tow boats had lights burning, both clear lights. When the ship struck the Etta White was right ahead. The Beaver was on the port side of the Etta White when the Thrasher struck. The Beaver was about a point on the port side of the Thrasher when the Thrasher struck. I had noticed a change in the course of the Etta White just before the Thrasher struck. My board is paid by Captain Bosworth while I am here. I want the captain to pay me a dollar a day. Capt. Bosworth has not promised me any employment. I have not been 40 promised any money at all by Capt. Bosworth. I came here from San Francisco; the captain brought me up and paid all my expenses and the captain promised to pay me a dollar a day from the time I left San Francisco till the time I leave here. I don't think I could point out on the chart where the vessel struck.

[Witness] Henry S. Mason.

HERMAN LARSEN.

Captain Bosworth, cross-examined by Mr. Jackson.—I entered into the contract for the towage with Henry Saunders; I did not sign any agreement for towage. I had never been to Nanaimo or Departure Bay before I went with the Thrasher. I don't know the

pilot regulations at Nanaimo; Nanaimo Pilotage By-Laws, 1879, put in marked D. I do not remember having seen this book. I paid inward pilotage to Nanaimo and half pilotage out; if I remember right I did not engage a pilot to take me from Nanaimo. Some time before I sailed Mr. Rogers and Mr. Urquart asked me if I intended to take a pilot. I answered I did not think it necessary as I was to have the services of two tug boats and other vessels did not take them. I think the half pilotage was included in the collectors charges. I did not pay half pilotage to Sabiston; I knew that half pilotage was paid; I knew I paid half pilotage because I did not take a pilot. The reason I did not take a pilot to Victoria was to save half pilotage. I did not enquire how much I saved. I made enquiries as to the captains of the tugs and they were represented to me as efficient men. 10 I made the enquiry of Capt. Smith and in particular of Capt. Johnson as to Capt. Smith's capabilities. I was informed that Capt. Christensen had piloted the ship B. P. Cheeney from Victoria to Departure Bay. The customary way of paying pilotage is by the foot. I am under the impression I saw the amount that was charged for half pilotage, but on my oath I could not say that I saw it. I don't know what I paid or agreed to pay Rogers for taking the ship up. Capt. Johnson of the Belvidere told me that he had known Capt. Smith for some time and that he had towed his ship safely. My ship drew about twelve or thirteen feet going up to Nanaimo; she drew 23 feet 6 inches coming down, and I knew I should save half pilotage by not taking a pilot whatever the pilotage might be.

Question.—When you first met the captain of the Etta White in Nanaimo did he not 20 say to you that he had been sent to help to tow you down? Answer.—I don't remember his saying so.

Question—And did he not at the time alluded to in the last question produce to you a telegram which whilst in conversation with you and Mr. Peck, who introduced him to you, he had then received from Mr. Saunders stating: "Beaver will leave at seven this evening with Henry Buck, wait till she arrives to-morrow morning. H. Saunders."

Answer.—I don't remember the telegram. Telegram, 13th July, 1880, put in marked E. I did not know where the Etta White had come from. I was informed in Nanaimo that Capt. Smith had come up to tow me down. I gave no directions to the tugs before leaving the wharf. I gave no instructions to either tug to proceed; they settled that 30 among themselves. When we were ready to leave I did not cast the lines off and say go ahead nor did an officer say so. I merely cast off. I had about ninety fathoms of hawser between the Beaver and the ship. I do not know the length of the hawser between the Etta White and the Beaver. I directed my course after the steam boats. I told the helmsman to steer after the tug boats. I recognize Benjamin Madigan, the engineer of the Beaver; I know Capt. Christensen by sight; I don't think I should know Jagers, mate of the Beaver; I know Capt. Johnson.

Question.—You recollect stating in presence of Madigan, Christensen, Jagers and Johnson on board the Beaver, at or about two o'clock on the day after the accident occurred, that you ordered the helmsman to steer for the Etta White? 40

Answer.—I do not remember; I was in an excited state of mind. I swear I did not say it. I looked over the chart with Capt. Smith in a general way. There was nothing said about courses.

Question.—Do you not know that even if you had a pilot on board you would not be justified in allowing the pilot to run your vessel into palpable danger?

Answer.—Of course. I should object if I was running into imminent danger.

I gave Capt. Christensen a cheque for the amount of the towage; it was a cash order; I suppose it was made payable to the tug boat company. I am not certain whether it was not payable to Mr. Saunders; I think it was likely to have been payable to Mr. Saunders as he was the agent and the person with whom I entered into the contract with and the only person I knew. The amount of the draft was \$600, I think. The hands were long enough engaged at the pumps to convince me they were of no avail. All hands pumped for a short time; it was more than five, I could not say it was more than ten minutes. I don't know whether I gave the order to rig the pumps before I went on board the Etta White or not. I think I did give it; but I had sounded the pumps before and 10 knew how much water she was making. I cannot say how long I remained on my vessel after I came off the Etta White. After I became convinced the ship was bound to go down where she was I left for Nanaimo on the Etta White. I can't say how long it was after the accident before I left in the Etta White, but there was (5) five feet of water in the hold and had been some time before I left, and gaining rapidly. I don't know what time it was that we started for Nanaimo. I returned to the wreck about daylight, about four o'clock. When I returned the ship was sunk on the bottom. The water was flowing over the deck on the starboard side. The water had flowed in so much that I could not get into my room; my room was on the starboard side. Telegram marked F. produced 17th July, 1880: I received this telegram from the agents of the owners. I received no 20 other telegram from owners in regard to not spending money about saving the vessel. I have not, nor have any of the former owners any interest in the ship since the sale. The contract for towage was all in one. It is not paid. The check for \$600 was given back to me. I asked Captain Christensen where it was and he gave it back to me.

[Witness] Henry S. Mason. ROBT. BOSWORTH.

Herman Larsen, re-examined by Mr. Davie.—I remember stating yesterday that my orders were to keep after the steamers, but I recollect the captain saying not to pay much attention to the old Beaver, but to keep after the Etta White. (He then asked the captain if he did not say so). The change which I noticed in the course of the Etta White was about three quarters of an hour before the ship struck. There was no change in the 30 course of the Etta White within three-quarters of an hour, nor in the course of the Beaver.

HERMAN LARSEN.

Capt. Bosworth, re-examined.—At the time of the accident the ship was lying in a bed of kelp for nearly one hundred yards outside and nearly twice as far inside. After the accident I kept continually sounding the pumps; I kept sounding as often as I could get the rod dry and see the marks. The fact of a ship having been ashore and repaired she always carries the name of a ship ashore and is detrimental to the sale of her and in getting freight. I considered the ship was irretrievably damaged whether she was got off the rock or not, that is for a grain ship or for carrying valuable or damageable cargo.

ROBT. BOSWORTH. 40

Charles Davis, master of barque Henry Buck, in July, 1880, was towed to Nanaimo by the Beaver; remember when Thrasher was towed out of Nanaimo by the tugs Etta White and Beaver; weather fine; nearly full moon; I suppose Bosworth a good navigator as he has been in command of a vessel for some years and witness understands that he still has command of another ship. Christensen in the Beaver towed witness down; took no pilot; thought I was capable of taking charge of my own vessel myself; I have never

taken a pilot in these waters; presume it is not usual to do so perhaps because we are so used to the coast waters; touched a rock whilst being towed down on this occasion by the Beaver, in Baynes Sound.

Cross-examined.—I have been on the coast a considerable time and have sailed in and out of Nanaimo three or four times; when I take a tug down I look after the course and see where I am going to; I generally let the steamer take its own course and I have never yet found it necessary to raise any interference with the steamer, but I keep my eye on the steamer and see where she is going all the time. If I thought the steamer was going a course I did not approve of should probable endeavor to stop her. I don't think I should signal her by shearing my vessel one side or the other. I suppose one of the 10 men on the steamer would be astern looking out. The usual way is by hailing or sounding a trumpet or something of that kind. This is the contract which I signed when I got on the rock in Baynes Sound. (Contract put in evidence):

“TOWAGE AGREEMENT.”

“Henry Saunders, Agent, Johnson Street, Victoria, B. C.”

“This agreement made at Victoria, B. C., this 13th July, 1880, between the undersigned as agent for the tug boat Beaver of the one part and Captain C. Davis, master and agent for the ship, or vessel, called the barque Henry Buck of the other part. Witnessest, That the said tug boat has engaged to tow the said vessel from Royal Roads to Nanaimo and back for the sum of three hundred dollars and that the master of said vessel agrees to pay the same in cash for said towage service. This agreement further witnessest that the master of said vessel agrees to assume all responsibility in respect of the strength and sufficiency of hawser used, whether furnished by said vessel or said tug boat, and that the tug boat and owners are not to be held responsible for the piloting of the said vessel while in tow of said tug boat, the latter being regarded as subject to the orders of the pilot or other duly authorised officer in charge of said vessel while fulfilling this agreement. In the event of the tug boat above named being prevented by accident, or other unavoidable cause, from completing this agreement, her owners or agents shall provide another steamer capable of towing said vessel.”

Chas. Davis.

Capt. John Devereaux—Is a master mariner and acquainted with Straits of Georgia; 30 is master of Dominion government steamer Sir Jas. Douglas; points out on chart proper course for clearing Gabriola Reef after passing Entrance Island. The directions are given in the sailing directions so as to clear the reefs; you are to keep Notch Hill open on Berry Point and this carries a mile to the northward of the reef. If you go inside of that line you do not know, sometimes the rock is above water, sometimes the rock is covered at half tide; another way shewn in the sailing directions of clearing the reef is by keeping Portier Pass just open or touching on the south east or quarter east bearing and that course clears the reef more than a mile, vide sailing directions, page 112. (Note.—The chart is put in and the sailing directions compiled under surveys made by authority of the Admiralty and which contain the notes from which the chart is drawn: sailing directions form part of 40 this case.) Witness continued: Is well acquainted with rock where Thra-her is stranded. In opinion of witness it is doubtful if tug towing a ship according to sailing directions could have landed her there. In my opinion directions have not been followed; it is a doubtful question of course. If they had followed the course of the chart they could not have landed there unless there had been a very strong ebb tide to carry them out; if there were a strong ebb tide it would have been the duty of the tug to keep a couple of points

more outside until they had passed the reef; the stronger the ebb tide the further out the tugs should have kept. If an ebb tide were running I should keep at least two miles off the rock, steering straight out to the eastward; there would not be the slightest difficulty by taking cross bearings in ascertaining exactly where you were and whether a mile or two miles from the rock provided land is in sight. If the night was clear the land must have been visible all the way down from Entrance Island and all the points from which bearings were to be taken must have been visible. Previous to wreck of Thrasher took soundings all around the rock on which the Thrasher lies and stood on the rock. From the point of the rock you can get soundings at 900 feet you will get eleven fathoms and until you get eleven fathoms from this point you get three, five, six, seven and from 10 that down to eleven fathoms; within 600 feet to the seaward of where the ship lies stranded you would get six fathoms or 36 feet. (To the Judge.—600 feet to a cable, 10 cables to a nautical mile. The white dotted space on the margin of the chart shews the subdivisions into cables. 300 feet to the seaward of the ship might be somewhere from three to five fathoms. In one direction the descent of the rock is perfectly gradual but due north and north west it is quite abrupt.) It would not be prudent navigation for a tug to tow a ship inside the line on the chart marked "see view," particularly at night. Question.—How much past the Thrasher Rock or how much past the Gabriola Reef would you go before changing your course from the eastward? A.—If I was sure I was past it I would lay it about a mile to the eastward of it, not before. I 20 should certainly make quite certain I was past the reef before changing my course. Q.—How would you ascertain you were past it? A.—If I could see the bearings of the land I would go by that; if I could not see that I would go by Fraser River light. There is no difficulty on a clear night in ascertaining your right course by land marks. There is an error in the chart as regards the position of Gabriola Reef; it is not exactly correct; there has been an error in transferring the field notes or surveying notes. The notes are perfectly correct. The reef is shewn on the chart to be about 800 feet further inside than the notes shew it to be. There are four rocks marked on that chart that are above water. Those four rocks are in existence. One rock marked on the chart is not in existence. The notes I refer to are the sailing directions. According to the true 30 position of the Thrasher rock it is at least a nautical mile inside of the "see view." If the sailing directions are followed the true position of the Thrasher rock is denoted and there is sufficient there given to avoid the rock. The sailing directions lead you one mile clear of the rock; it could not be otherwise unless there was a strong current and tide and you did not guard against it. Since the compilation of the sailing directions no new directions have been given for clearing the reefs, but I hear there is such a notice in the Custom House. Entrance Island light is visible in clear weather 16 miles, 14 anyway. I believe the Thrasher rock is one of the four indicated on the chart as forming Gabriola reef but it is out of place. Question.—Is the true position of the Thrasher rock generally known among navigators in that location? A.—The position of that rock 40 is generally known to every pilot in the country. Perhaps they have never been standing on it the same as I have myself but they know it from the position of the kelp around it and before the beacon was put there they never assumed to go there within the distance they go now. They gave it a wide berth, although the beacon is misplaced. The beacon is more than half a mile from this place and there is no light on it. I should go far enough from the beacon not to see it at all. You could not see the beacon on a dark night. In the month of July there are four or five acres of kelp round the vicinity of where the Thrasher is; kelp is an indication of danger. It is not prudent navigation to go inside of kelp unless there is a very light draft of water. The reef upon which the

Thrasher lies is a continuation of Gabriola reef. There are several narrow passages between the rocks forming the same. The entire reef is about three-quarters of a mile in extent. The beacon is never used by mariners as a guide; every one knows it is out of place.

Cross-examined.—Knew the beacon was out of place the year it was put there. I found it out when I saw it, besides I was told. I verbally so reported it to Capt. Cooper the agent of marine. This was in 1876. The beacon is on the inside rock instead of the outside. There is a double error, the beacon is placed on the wrong rock and is not marked on the rock it actually occupies, the beacon ought to be on the Thrasher rock. By the chart the Thrasher is lying 1250 yards from the beacon. The depth of water between the Thrasher rock and where the beacon is 17, 20, 23, 24 fathoms and less and sometimes there are rocks almost up. I never put a plot on paper or kept any record of my soundings. It is full of rocks, foul ground. I don't know all the rocks in the place; know a good many. By running on know one rock; Chain Island. Went on shore at Burrard Inlet with the Isabel. Where the Thrasher is lying eleven fathoms is marked on the chart. In the notice respecting the Thrasher rock contained in the London "Gazette" dated 29th Oct., 1880, the same directions are given for clearing the Thrasher rock as are given in Richard's directions for clearing the reef. ["Gazette" notice read.] Have been in charge of tugs in towing from place to place and in sailing ships in other parts of the world, mostly with pilots; I don't think I have ever been without one as well as I can recollect. It is twenty-five years since I was in charge of a sailing vessel. If there had been a mirage so that I could not see the land I would have gone on until I picked up Fraser river light. If you hug the land you must expect to get ashore. If you can't see the land you have no business to keep inshore. If the moon were full it would be an ebb tide, three-quarters of a mile outside Entrance Island; a course east from Entrance Island would clear the reef, that is if your compasses are right and there is no current. Have never seen fresh water from the Fraser river in that neighborhood. There is a large body of water coming from the Fraser at that time of year.

Re-examined.—There are fifteen miles of sea room to the north of Gabriola reefs where the Thrasher might have been towed with unquestionable safety. It is very imprudent navigation to neglect to take bearings when you are not quite certain where you are and want to find out.

To the judge.—If I had been on board the tug for half a mile or a mile before the Thrasher struck and had been looking out I should not have thought I was in a safe course. I should have thought we were going into danger. If I had been on board the Thrasher I should have thought the same. Q.—By the judge—Any competent man on board of any of the three vessels, if he had been looking out would probably have known she was going into danger that night? A.—I think so; yes, decidedly my opinion.

Capt. Wm. Clements.—Am engaged piloting to Nanaimo; last July was in command of the Pilot, a steam tug, she was I think, running in combination with the Beaver and 40 the Etta White; in towing it was optional with the captain of the tow whether he took a pilot or not, sometimes they did sometimes not. I have towed several ships with pilots, several without. The general rule in towing is to keep the steamer on the side the hawser is fastened so that you can see clear of the jib-boom, and so that the man at the wheel of the ship can see the steamers mast, or light, and also to keep the hawser clear of the head gear and to escape steamers back wash. The usual course after leaving Entrance Island, half a mile north or three-quarters; if the compass is right, is to steer

east in the day time; half north at night; east is very near the view line. If you knew exactly where the reef was you could with prudence steer quite a little way inside of the "see view" line. I know the rock on which the Thrasher is stranded; I see her there every time I go up and down; have seen the water break over that rock several times. I believe in rough weather at low tide; I don't think the water broke on the rock where the Thrasher lies before she went on. In the course of my towage I always deemed it prudent to keep from a quarter of a mile to a mile and a half clear of where she now lies; the dangers surrounding the place where the Thrasher lies stranded were known to me prior to her stranding; the water indicated sunken rocks there in rough weather if you went near enough. I would not have approached those places at night with a tow if I knew 10 where I was going with it; could easily find where I was if it was clear so as land could be seen. If I could see the Entrance Island light I would know if I was in too far; there is no difficulty in knowing where you are if you pay attention. The greater the depth of water your tow draws the further you keep out. There would be no difficulty in finding out the rate of speed you were travelling at; you might heave a log or take bearings. There is no difficulty in finding out exactly where you are if you take bearings and can see anything to take them from. You can take them from Entrance Island light, Flat Top Island or Point Atkinson light. There are also a great many breaks in the land. Do not think a prudent course could have been steered or the Thrasher would not be where she is. Witness describes the land marks mentioned in the sailing directions for clearing the 20 reef. When you can't see these points, in order to be sure you are clear the reef, you steer ten miles after you pass Entrance Island light on an east course and until you see the Fraser light then there is no doubt you are clear of it.

Cross-examined—Have been up inside the reef; towed a ship up inside between the reef and Gabriola Island. There is a passage there between the reef and Gabriola Island. I towed the Challenger up inside and anchored behind Flat Top. There is quite a nice harbor there, (sailing directions quoted which speak at page 70 of a channel inside which is not generally recommended.) The inside channel is frequently taken to avoid north west winds. I would not go up at night. The channel is about a quarter of a mile inside the beacon. The shoal on which the beacon is erected extends two and a half miles. 30 Have been considerably nearer the beacon inside than where the Thrasher now lies from the beacon. First saw Thrasher rock wash three years ago when I first went towing up there. I always supposed where the Thrasher is, to be a continuation of the reef. Have never compared it with chart. I am a pilot, and I suppose I have charge of the ship and tug too. I always treat myself as having charge of the tugs; they always go where I direct them; when I was running a tug boat, when no pilot on board, the captain had charge of the ship; he generally followed the tug; when he wanted me to go a certain rate or course it is my duty to go there. I took my orders from him if he saw fit to give me any. The captain is in charge of his own ship, the tug goes where he tells them to. Have seen Fraser river water all the way across the gulf nearly to Portier Pass. In heavy freshets 40 think it comes up above the reef. In towing in this locality the master of the tug depends more on his local knowledge than he does upon his chart. Don't bother the chart much. Don't pack charts round with them very often.

By the Judge—Will you look at the chart, you see Entrance Island, you see that cross at which the Thrasher went ashore. Now in going from Entrance Island there that is not according to the course you have been mentioning? Ans.—No sir. We generally come from half a mile to three quarters outside the Island and down east or east a half north. Ques.—If you run east that would carry you from half a mile north? A.—Yes.

Q.—That would carry you clear of the Thrasher rock? A.—Yes. Q.—You have heard the night described as a clear night? A.—Yes. Q.—Could any competent person, you, if you had been on board the tug for a mile before you got to the rock could you have told that you were going right or wrong? A.—If I had been paying attention I could have told I was too near the land. Q.—And I suppose any body on board either of the three ships could have seen the same thing? A.—Yes sir. Q.—That is always presuming they had local knowledge? A.—Yes sir, any body familiar with the land.

Capt. George Rudlin, master of steamer Wilson G. Hunt, plying between Victoria, Nanaimo and Comox—Was in the towing business before running the Hunt; several years in that business; used to look after steam tugs; acquainted with passage from Entrance 10 Island past Gabriola reef; know rock on which Thrasher lies. Before she stranded knew there was a rock somewhere there; could not tell exact place; used to steer at night so as to clear the rock, east half north coming down the gulf, and if the wind was northerly would steer east by north. If there was any current from the Fraser would haul out a little more. In the result by steering such course would go about one mile and a half to the eastward of the rock. A prudent man would not steer within that distance unless there was a strong wind from the south and west when he might steer a little nearer. The course which I have indicated would take outside the line marked on the chart "see view," east half north magnetic would take outside of that line; that line is due east. Ordinary care would avoid any danger to a ship of the size of the Thrasher in being towed 20 down the Straits of Georgia; there is plenty of sea room where there are no rocks. The water inside of the "see view" line has always been considered dangerous. It has been generally known among navigators to be dangerous and generally to masters of tugs. I was a licensed pilot for two or three years. It was not usual to employ pilots to navigate tugs; I had a license to run a tow boat but not as a general pilot. Before changing my course in coming down the gulf past Gabriola reefs I used in general to wait until Portier Pass bore south by east and the light ship bore south by east without altering my course. I would not alter my course until I saw Fraser river light unless it was a clear night and I could see the land. The light ship should bear east by south. If I caught Burrard Inlet light, Point Atkinson light, I would bear a little north east, a little east of 30 nor'ard bringing me in then I should shape my course down the gulf. Have towed inside the reef when strong westerly winds blowing i. e., in the day time. Have seen Fraser river water extending to the reef and close to the Ballinac Islands. The more Fraser river water I saw the further I would keep out. The tugs ought to have known by looking at the land that they were too close in shore, and of course if there had been a pilot on board the ship or any one acquainted with navigation he could have told the same think. I do not suppose a stranger would have thought about looking. You can see Entrance Island light about fourteen miles I think. It is four years since I was in the business. If a captain or master of a tug took no bearings he would be apt to get into danger unless he had a nice clear night.

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Cross-examined—Don't know where Thrasher is on the chart; never took any bearings of her; eleven fathoms is ample water even for the Thrasher. Ques.—In towing a heavy vessel down if that vessel is on one quarter all the way doesn't it have the effect of drawing the tug off her course more or less? Ans.—Well, very little. If the ship should be a couple of points off, the effect would be to draw the tugs off the course. It would alter the course materially if the ship did it steadily. If the ship kept on doing it the tug would guard against it. The tug would put her helm the opposite way. It is the duty of the tug to keep ahead of the tow. I always used to hail the ship and tell them to

steer after me. Q.—Supposing the ship goes off would'nt you consider the course of the tow the course you were to take? A.—No. I never take it. If there was a pilot on board, if he would hail me I would have done so and tell the ship to steer after me. I take the orders from the pilot if one is on board. If there is no pilot I generally used to go my own road. The captain of the tow was my employer. If he gave me any orders I would obey them. In towing a ship up inside the reef I would go a great deal nearer than I would come down outside. In coming down inside I would keep mid channel perhaps about a quarter of a mile from the beacon. Q.—If you were outside of the beacon and in eleven fathoms of water, you would be safe there? A.—I never approached the beacon near enough to know, not on the outside. I was considerably closer to the beacon when 10 on the inside than the Thrasher now lies out. Have seen mirages and fogs along the shore in midsummer; effect is as a general thing to throw the land further off than it really is and you cannot then be governed by any points you see, in fact it changes the whole appearance of the coast. The first time that I knew of the rock where the Thrasher is was in 1865. I will not swear it was the same rock. I saw there were rocks around there and I knew there was danger and I put my vessel around and stood off the rock. I suppose there is a number of rocks between where the Thrasher is now placed and the rock on which the beacon is placed. I think I have seen four or five rocks dry at low water but I don't know the exact position. Q.—You are not certain that you ever knew that the Thrasher rock was there before? A.—No. I would'nt swear to that one rock. 20 Am slightly conversant with the charts of the coast. Don't know whether Thrasher rock is marked on chart or not. I know that there are rocks around there in the vicinity. The Thrasher lies about a third of a mile from the beacon; never reported the rock to the pilot board. Don't know that the Thrasher rock was generally known; I knew there were rocks in the vicinity. Suppose Thrasher rock would be dry in summer months and in winter months. Wouldn't swear to seeing that one rock dry.

Re-examined—I knew there were rocks around there; reason never reported because naturally supposed everyone knew of them; thought the rocks around there nothing wonderful. Have frequently encountered mirages; would give the land a wider berth; I steer by compass; you can see the land marks at night and Portier Pass unless it is very 30 dark; on an ordinary night you can see Portier Pass four miles off; see the gap; it is difficult to make out Flat Top Island at night because there is high land behind it; it is very difficult to take cross bearings.

Thomas Eric Peck, receiver of wrecks for Nanaimo—Held an enquiry in that capacity. James Christensen the master of the Beaver, Mr. Smith the master of the Etta White and John Jagers mate of the Beaver, all gave evidence under oath. [Counsel for plaintiffs proposes to put in evidence; the statement of Christensen and Smith rejected.] Knew the Gabriola reef before striking of the Thrasher; it was generally known in neighborhood of Nanaimo; have seen a rock a short distance from the Thrasher bare, to the port hand between the shore and the Thrasher; the Thrasher rock may be a continuation of the same 40 rock which I saw bare; I never saw the Thrasher rock bare nor any other man; the bare rock which I mention is 60 to 100 feet from the Thrasher.

Cross-examined—The day after the wreck I drank fresh water from along side the wreck; I suppose it came from the Fraser river; there is no other place it can come from; the fresh water extends to Cowichan Gap; it was nearly full moon at the time of the accident.

Capt. Thomas Pamphlet--Am a master mariner; have seen where Thrasher is stranded; knew the reef some time before, twenty years or more; it was a generally known rock, known amongst all seamen around here; to the southward of the Thrasher are some rocks that dry; where the Thrasher lies is part of Gabriola reef; I believe it to be so; it is all scattered about, but I believe it is part of the reef; by following the course pointed out in the sailing directions you would steer well clear of the reef as it actually stands including the rock where the Thrasher is; by following the sailing directions you clear the reef by a mile; there is no difficulty when you can see the land in discovering where you are from Entrance Island down past the reef; the Entrance Island light is visible some distance below the reef; you can shape your course from that light; you cannot get into 10 danger if you shape a proper course from that light; we generally keep about the line of the "see view;" in the night time I would not come inside of it; it would not be prudent to do so at any rate; if a ship could not see the shore it would be necessary to take bearings of Entrance Island or some other light; there is no difficulty in the master of a steam tug that is used to the boat ascertaining exactly the speed he is travelling through the water; there would be prominent openings along the land which shew a man just where he is if it is a fine night; if it was hazy or heavy you could not see the Flat Top Islands; a good lookout is generally kept on board the tugs to see that the tow steers pretty well after them; a man at the tug's wheel can tell in a minute if there is bad steering because the tug boat will commence to steer badly; when the tow steers badly it is the rule to call 20 attention to it from the tug; in towing the tow always steers on the side that the hawser is attached so as to keep the head gear clear, get a view of the tug and see how to steer.

Cross-examined-- Have no master mariner's certificate from board of trade or Dominion Government; am not a master mariner; have known the rock where the Thrasher is for twenty-three or twenty-four years; it is part of the reef; I don't know much about the chart; I never took any bearings that distance off; could not say if the Thrasher is on part of the reef as laid down on the chart; witness then pointed to me of the rocks marked on the chart as the rock on which the Thrasher was stranded, north of west of the beacon; took bearings round it about ten years ago; only saw three or four rocks on the reef; took my bearings by a common compass; I had no sextant; came to the conclusion the reef 30 was wrong in 1866 or 1867. Believe there is a lithographic error in the chart. I have never reported, though I have been a pilot in these waters. The beacon is on a rock, part of the same reef as the Thrasher lies on. It is not rightly marked on the chart. I suppose the Thrasher is about a quarter of a mile from the beacon. I don't go much on the Gazette which says six cables length.

Hartley G. Young.—Was second mate of Thrasher on occasion of the stranding; Bosworth was master; Bosworth was a stranger on the coast; had not been higher north than San Francisco. We left Nanaimo between six and seven on evening of 14th July. Passed the ship's hawser to the Beaver; it was fastened to the ship's port bow; the Etta White took her own line ahead and made fast to the Beaver; was on deck when towing commenced looking after the fenders; Bosworth on the poop; no orders were given the tugs from the ship as to the course to be taken that I am aware of; tugs are supposed to use their own discretion in towing out or into harbor; no pilot on Thrasher; it is not usual to take pilots when tugs are engaged. I have been on the coast seventeen years. We had Captain Rogers as pilot going up from Victoria. As soon as we started a regular watch was set on the ship. From six to eight p. m. it was the first mates watch; at eight o'clock I took charge; eight men in my watch; weather fine and clear; dead calm; twilight was not down at the time of the accident. Moon rose about nine or nine thirty p. m. and

was nearly full. At that time of the year there is no real night in fine weather. There was no mirage along shore; could see the outline of the beach and the trees plainly. Capt. Bosworth remained on deck till half past eight or twenty minutes to nine. Ship struck between twenty minutes past nine and twenty minutes to ten. Observed ship's course from time she rounded Entrance Island until she struck and it was east by south by our compass and our compass was correct. It was between seven and eight when we passed Entrance light. I was on deck at the time. We were a full point east by south. We went about half a mile outside of the light house. We had spirit compasses. Thrasher was a nice steering ship. In steering you are supposed to keep the tug a point or a half point on the bow the hawser is on. From the time I took charge I did not leave the 10 poop until she struck. When she struck the ship was heading E. S. E. and within half a point or a point in line with the tugs and that distance is allowed to keep the hawser clear of the head gear and so that the man at the wheel could see the lights; could see the land all the way down. I have towed down the coast before. I was satisfied in my own mind they were a little too far in, but it was not my duty to interfere and I thought they knew their business. I did not report to the captain; did not know whether there was danger or not until the ship struck; I was not acquainted with Gabriola reef as well as I am now. If I had had any idea danger existed where we struck I would have cut the hawser and let the ship go off. When ship struck was on the poop; got forward as fast as I could on to forecastle. Etta White had carried away her line and was ahead; Beaver 20 did not carry away ship's hawser. Beaver kept on towing. Hailed him and he said it was Gabriola Reef. He said "all right she is coming" and kept on paddling. Ship was seven feet out of water. When we left Nanaimo the ship drew 23 feet seven inches of water. The captain got on the forecastle in his night clothes. Bosworth seemed paralyzed to see the ship ashore. Think Beaver must have gone through one of the crevices of the reef or she would have struck also. Used every effort we could to save the ship but of no avail. It was useless to tow her from astern as she would have sunk. There were acres of kelp round where the ship struck, excepting just off the port quarter; there was no kelp there. On the port beam I should think the kelp extended for two hundred yards. Right off the port fore rigging as near as I can judge 200 yards there was four and a half fathoms; from the ship it runs three and a half to four and a half fathoms from the port bow at half tide. [Q.—What would have been the consequence if she had steered several points to the seaward or to the port instead of the starboard at the time she struck? A.—If she had been steering N. E. she would have struck all the same in the line of E. by S. or E. by N. If she had been steering N. E. or N. N. E. she would have struck; she could not have escaped it in that place.]

Cross-examined.—After the tugs rounded Entrance Island they steered east by south which I call a wrong course as that would put them ashore, especially with a current from Fraser River setting on the port bow that is bound to drive you inshore a little. I did not think it necessary although the tugs were steering a wrong course 40 after leaving Entrance Island to refer to the first mate or the captain or any body. I supposee they knew where they were going. I had charge of the ship's deck. If I had seen the tugs running on Flat Top Island I should have said something. Our compass is about a quarter point to the westward. I thought we were too close in shore some fifteen minutes before the ship struck, closer in than I had ever been before. It is not my place to change the course. I had got my orders to follow close after the tugs. Even if I had seen a rock right ahead and kept the ship from the course she was steering after the tugs and anything had happened to the ship they would have hung me. Though I saw the ship going into actual danger I had no right to change the course. If a pilot is

on board the ship he has to command the ship itself; he has no right to give me orders; he might command the helmsman. I think if a pilot had been on board and given instructions to head her out fifteen minutes before she struck she might have been saved; you can signal a tug by waving a hat or a handkerchief. The object of having a pilot on board is merely to relieve the position of the captain and take the responsibility off from him. The pilot is supposed to know the reefs and rocks, shoals and everything. I believe in British Columbia it is not compulsory to take one. Q. The almanacks states that the moon that night was in its first quarter, is that correct? A. I don't know about the almanacks. Two days after the Thrasher struck the Etta White got ashore outside of where the Thrasher was and the Etta White only draws eight or ten feet of water. She 10 stayed ashore one tide. Have been to Nanaimo six times altogether; was shipped at San Francisco. I piloted Thrasher into Royal Roads and after that my piloting was done. Have never been inside of Gabriola Reef. Knew Gabriola Reef was somewhere in the Gulf of Georgia. Didn't examine the chart. No course was set. The orders were to sail after the tugs. If after leaving Entrance Island had seen tugs going due north would have called the captain and ask where he was going. If I was first officer I would hail the tug and ask him where he was going. For ten or fifteen minutes before the ship struck I thought the tugs were too close in shore, closer than ever I had been before.

Ques.—The tugs were not going a wrong course on this occasion were they? A.—It appears they were.

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Mr. Davie—At that time? A.—The result was that I think they were going very wrong.

Mr. Drake—You thought at the time? A.—I thought at the time before they struck that they were too close in shore, closer than I had ever been in there before.

Q.—How long were you of that opinion before the accident happened? half an hour? A.—Ten or fifteen minutes.

Q.—Up to ten or fifteen minutes before you struck they were taking a right course according to your view of the matter? A.—They were taking a right course.

Q.—Were they? A.—No, they were not, taking a very wrong course.

Q.—All the time? A.—Yes sir, keeping them off east south east.

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Q.—During the whole time from Entrance Island? A.—No, I didn't say that.

Q.—I want to know, after they rounded the Entrance Island, half a mile off? A.—They steered east by south.

Q.—Is that the wrong course or the right course? A.—I call it a wrong course. I think east by south will put her ashore.

Q.—About half a mile from Entrance Island? A.—I think it is about half a mile we pass clear of it.

Q.—You think that is the wrong course? A.—I do think it a wrong course, particularly with a freshet out of the Fraser river setting over on your port bow. That is bound to drive you in shore a little bit.

Q.—Particularly of freshets setting out the Fraser River. You knew there was a freshet setting in there? A.—I know it is a natural consequence.

Mr. Davie—You knew it at the time? A.—I know it.

Q. You know it? A. I know it.

Q. Did you know it before the ship struck? A. Know what.

Mr. Drake—That the freshet was setting in? A. I don't say that I knew it just at that time. But when the freshet is coming down out of the Fraser it naturally looks over towards that side. You have it on the port bow or port beam as you are going down that gulf. I have seen the water muddy and riley there, right alongside the ship while we laid there on the reef.

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Q. Now you knew as a fact that the tugs were towing the wrong course as you said by your compass half a mile after leaving Entrance Island, and you never referred to the first mate. A. Not necessary to do so.

Q. Did you refer to the captain? A. I didn't

Q. You referred to nobody? A. I referred to nobody.

Q. You never hailed them? A. I never hailed them. No, it is not my place. I supposed they were two qualified men, two pilots.

Q. You supposed they were two qualified men, two pilots? A. Two qualified men, two pilots been sailing up there for years. I supposed they knew where they were going.

Q. Who had charge of the deck? A. Charge of the ship's deck, I did. Think from 20 Entrance Island to the reef the ship was being towed from seven to ten knots per hour. Did not notice. It was an ebb tide. When I say seven to ten knots I mean past the land; could not judge any nearer as I did not feel interested to know. Orders were given by Captain Bosworth at Nanaimo to cast off the lines; Christensen gave orders from tug to let go every thing; Capt. Bosworth gave the order "all clear go ahead"; when the captain went below I was in charge of the deck myself. I was not sure the ship was in danger; I had my suspicions she was too close in. Did not consider it necessary to hail the tugs or call the captain. I supposed the tugs knew where they were going; I did not take notice as to the speed the ship was going; it was my duty to see the ship kept after the tugs. I did not notice any current before the ship struck. If I had known we were 30 close to the reefs I could not have saved the ship because we might have kept her off six points and still we would not have cleared it. I never saw the ship was going into danger. I thought she was too close in, closer than ever I had been towed down there before. If I had had any idea the ship was going ashore I might have done differently from what I did. Bosworth's orders to me before he went below were to keep right after the tugs.

William McCullock—Am master of the steamer Otter in the Hudson Bay service. Have seen where Thrasher is stranded once since the stranding. The place is considerably inside of where I generally go; from a mile to a mile and a half; I would think I was close then. Have been engaged in towing. If I had been a tug and had been towing a ship drawing 24 feet of water I should have towed two miles outside of where the Thrasher is. 40 I would not have considered myself at night safe within one mile. There is no difficulty on a bright night in ascertaining exactly where you are when towing past Entrance Island. There are a great many indications which mariners know and which point out exactly

where you are. If the shore should not be visible, by taking bearings from the lights you could tell where you were.

Cross-examined—Have been inside Gabriola reef in a boat, never in a ship; can't say how far the Thrasher rock is from Gabriola reef proper but is a considerable distance. Has seen rocks dry to the seaward of where the beacon is; can't say he knew rock where Thrasher is, but knows there were rocks in that vicinity; I call Gabriola reef proper a reef of rocks about a mile or a mile and a half in extent and the Thrasher rock is one of them. After leaving Entrance Island by night if you are half a mile off, east would be a fair course; east half north is generally my course. There is no difficulty for a man who can read and write and who has a tolerable good sense with a chart and sailing directions 10 and compass in taking that course. A man so circumstanced if he was going south of east would know he was going wrong.

James McIntosh—Am a British Columbia pilot. Agree with evidence of McCulloch. There is no difficulty in keeping clear of the rocks.

William Scott—Am a British Columbia pilot. Proper course to tow after leaving Entrance Island is east half north; that course is the one generally known among mariners. No difficulty in keeping that course in fine weather; no prudent man who is acquainted with the coast would keep to the south of east by compass. It is never deemed prudent to keep inside of the line upon the chart marked "see view" unless you intend to go inside altogether. Pursuing a proper course would take you over a mile outside 20 where the Thrasher is. In clear weather might go close; if weather hazy might keep further out. Have never seen rock on which Thrasher is; have never towed as close in as where the Thrasher is, but have seen the water breaking around where she is. In towing have always pursued the course just indicated. Beacon is not recognized by mariners as a guide. The tow generally steers a little off on one quarter or the other according to which bow you have got the hawser on so that the hawser wont chafe the head gear; the man can see the steamer and to avoid the steamer's back wash.

Cross-examined—Am not now a pilot from Nanaimo but only from Victoria, the Victoria District. Have taken vessels to Nanaimo; have only seen the Thrasher once. If I was pilot on board I should give the instructions to cast as the pilot is in charge of the 30 ship. If I was pilot and saw the tug going wrong I should signal the tug to alter her course. If I was on a tow and wanted to direct the tug one way or the other in fine weather I should do so by hailing. If I could not make myself heard I should put my helm one way or another. Two miles and a half from where the Thrasher lies after leaving Entrance Island I could have taken precautions to save the ship providing there was no current setting in towards Gabriola Island as there was at the time of the wreck and is at that time of the year; after passing Entrance Island three quarters of a mile out east magnetic would be a safe course. Before the divisions of the different districts I was a pilot for Nanaimo. I still hold a certificate. Certificate produced as follows. This certificate has never been revoked and I know of nothing which renders me less competent 40 to pilot a ship in Nanaimo than I was when I received my certificate.

William Ettershank, a pilot, agrees with Scotts' evidence. You must make east good, keep further out according to the wind and tide.

Cross-examined—The pilot is a local assistance to the captain; he generally takes his position up in the tow to take command of her as he can see there better.

Herbert G. Lewis, master of the H. B. Co.'s steamer Princess Louise—Have been running steamers on the coast off and on for twenty years; know the ground from Entrance Island so as to clear Gabriola reef; ship should go east or east half north. It just depends, if it is a dark night I keep east by north magnetic; would only go south of east if it was blowing a strong westerly wind, westerly gale or south westerly gale but east and east half north. East by north is the course generally steered. Would not go to the southward. One of the marks for shaping your course is Entrance Island bearing upon Notch Hill; another is Portier pass open or just on, i. e., touching, that carries you clear. The Entrance Island light is to be plainly seen as you go down; easily take bearings. If it is a clear night you can tell where you are from the land; if it is any way hazy you have 10 to take your bearings from the lights. No difficulty if you can see the Entrance Island light in discovering where you are. If there was a current setting in you would haul more to the northward. The same if there was a wind from the north; you could not tell the effect of a current without taking bearings of the light; know where Thrasher is and am acquainted with the locality; can't be certain I have ever seen the rock she is on but have seen rocks in the vicinity. The rock on which the Thrasher is stranded is, I think, a continuation of Gabriola reef, at least I know it is all broken rock in and around there. It is not prudent navigation for a ship to come within half a mile of where the Thrasher is. It is imprudent navigation; I always kept a mile and a half or two miles outside, just depends. In the night time perhaps three miles. Do not think a ship steering her 20 proper course from Entrance Island could become stranded on that rock unless the current or wind or something drove her on. If a man would take bearings he could never be driven where she is.

Cross-examined—Have never seen that rock bare. I could not lay down the position of the Thrasher rock in the chart for certain as I have never been near enough to take bearings. As a master of a ship if I was leaving port in charge of a tug on a coast of this description I would not go to bed. It is not the duty of a master or prudent. It was the captain's duty to keep on deck and see how the ship was going; and in these inland navigations the captain should stop on deck even though he had a pilot on board.

Arthur Finney, contractor who built the beacon in 1873—Was engaged building it 30 eleven weeks. During that time had opportunity of judging the shoals in the vicinity. Was requested to do so by Capt. Cooper and did examine them. I got my boat ashore on a rock which was outside the beacon, the same rock the Thrasher is now near or partly on. Reported this to Capt. Cooper. That rock shews at low tide; I have been on it. There are four parts of the reef altogether which dry. During present week have examined place where Thrasher is; took soundings. To the seaward of the Thrasher i. e. on port side which looks towards the Gulf of Georgia at four feet distance obtained soundings upwards of two-thirds of a fathom. There is less water to the port side of the ship than there is where she is stranded. For about thirty yards to the port side there is less water than where the ship is stranded. On the other side of her there is deep 40 water, that is towards the land. I took these soundings on Sunday last and Robert Gray was with me and Thomas Digman. We were in a large northern canoe. We passed over the rock once, but as it was heavy weather considered we would be liable to touch the rock and burst our canoe. When I speak of passing over a rock I mean a rock in a line with the bows of the Thrasher.

Cross-examined--The Thrasher is now heading about north and south; bow to the south. Placed beacon where I was directed by Capt. Cooper. I have seen four rocks

there only, that is all I can say. Am a carpenter by trade. The beacon is half a mile or more from the Thrasher rock I should think and I have seen a rock between the Thrasher and the beacon. The beacon is marked in the right place on the chart on the larger rock. There is a rock to the south of that and one to the west and one to the north; these are all I saw; I cannot show you on the chart the rock on which the Thrasher struck.

Robert Gray—Have recently examined position of Thrasher; she lies about north and south. Am a seafaring man; keep the lighthouse at Entrance Island. Took soundings with last witness on west side of ship; soundings to the west were a few feet less than on the starboard side. For twenty or thirty yards to the west there were less soundings than to the east. There was about a fathom to the east side; the water was deeper on the east side than on the west. I could not swear that I ever saw the rock where the Thrasher is stranded. Have seen water breaking round the region where the Thrasher lies.

Cross-examined—It was a fish line with which we took soundings, not a lead line. We had a little piece of iron for a weight on the end of the line. We had no measurements; I measured by my arm; could not tell within a considerable number of feet the depth.

Robert Gray, recalled by defendants—Remember when Thrasher passed Entrance Island in tow; she was about three fourths of a mile out, further out than many other ships go. They took the north passage.

DEFENDANTS' EVIDENCE.

Edgar Crow Baker—Am a Trinity House pilot; hold a masters certificate and am a navigating lieutenant in the navy; have been accustomed to marine surveying which is part of my profession. Has made an examination of the chart respecting the region where the Thrasher lies. Produce a hydrographic sheet of abbreviations referred to in the chart, which is an appendix to all charts. The dotted line outside Gabriola reef is the limit of danger line; that is there is no danger outside of that limit. The explanation of the small crosses is sunken rocks that don't uncover at low water. Went to the neighborhood in October last on the 28th; made a survey of the reef. [Result put in evidence 30 marked .] First went to the beacon; it was then three quarters of an hour after low water and erected the tripod azimuth compass and took a line of bearings; a complete circle of bearings; my object was to ascertain the exact position of the beacon; I also took a line of sextant angles with a lunar sextant to verify that position. The result of those observations placed the beacon where I have laid it on this chart about one third of a mile from where it is laid on the authorized chart to the south west of it. I also took the position of the Thrasher, but not in precisely the same manner because it was impossible to erect an azimuth compass, but I took sextant angles and fixed the position of the Thrasher as I have laid it on the chart. I made the place where the Thrasher is, a little over a third of a mile from the beacon; about six cables. On Gabriola reef in the 40 authorized chart there are four rocks marked as visible. I only saw the one on which I stood i. e. the one where the beacon is and the one to the N. W. of the bank on the extreme edge on the left of the bank. Those two were the only ones I saw at that time, that of course was in October. It was low water, at least the flood tide had made about an hour. There are not such extreme low tides in October as in July. From my examination the Thrasher is not on Gabriola reef as marked on the authorized chart; I sounded

under the bows of the ship and got five fathoms, but there was a pretty good swell on. I did not do much sounding; I was sent there for the purpose of ascertaining the position of the beacon and the position of the wreck. I think the ship lies on an isolated rock because there is deep water in there; between there is $4\frac{1}{2}$ to $7\frac{1}{2}$ fathoms. We went in between in the Etta White.

Q. There is a distinct channel runs between the Thrasher and the Gabriola reef as laid down here?

A. Precisely.

Q. Sufficient to take a large vessel?

A. There was sufficient water there at the time I was there to take a vessel through 10 and the Etta White went through. The width of that channel is about two cables or between four and five hundred yards.

Q. That lays between Gabriola reef proper as laid down on the chart and the place where the Thrasher lies?

A. And the place where the Thrasher now lies. Have laid off on the chart the course as laid down in the sailing directions page 13, and the two bearings there given intersect on the line of the reefs as laid down on the chart, and the conclusion I draw from my examination is that the sailing directions have reference to the Gabriola reef as marked on the chart and not to the outlying rock the Thrasher is upon. The Thrasher rock lies quite outside of that, a third of a mile. Passing Entrance Island half to three fourths of 20 a mile; I should say a reasonable course would be east magnetic according to the chart.

Q. Now from your experience as a seaman, Mr. Baker, supposing that course was laid round Entrance Island, and a vessel of the Thrasher's size laden down, with a tendency to be steered inside, what effect, do you think, that would have in the distance running from the Entrance Island, to Gabriola reefs, would that have any effect in drawing her towards the shore?

A. Well, sir, much would depend on circumstances, as regards current, winds and soforth. The question, I presume, you want me to answer, is whether she would sag in there. I think there is always a tendency to sag in towards the land, on that side, in towing.

30

Q. Do you know which way the current leads?

A. I am not conversant with these waters, at all, you know; I don't profess to be a pilot for these parts?

Know the duty of a master of a ship in tow; have acted as such. Duty is never to leave the deck whilst vessel in pilotage waters whether a pilot on board or not. The difference between pilotage waters and navigable water is, in navigable waters there is lots of sea room and the tides would not affect me and I could ascertain my position by head reckoning or nautical observation. Pilotage waters mean when there are known points visible from which bearings can be taken to lay position of the vessel on the chart and for which pilots are generally employed. As pilot on board a 40 ship would give orders to the helmsman; I should walk up and down the bridge and give him my orders from time to time. I should take control of the tugs. Ordinary way of directing tugs in these waters is to sheer one way or the other. The tow has the tug entirely at her command; she can put her wheel one way or the other; she goes where she pleases. She can cut the hawser or throw it overboard. That is the custom in these

waters as I am informed. I am secretary of the pilot board and of course am conversant with what usually takes place between masters and pilots. It would not be prudent for the master of a tow to go to bed even if he had a pilot so long as he is in pilotage waters and certainly not if he exercises that vigilance which a master mariner should do when in pilotage waters. Having a pilot on board does not free the captain from responsibility. The master has the whole control in the absence of a pilot; if he has a pilot on board he does not interfere unless he has good reason to do it and the pilot was taking him into palpable danger; he would in that case suspend the pilot and take the charge out of his hands. If he has no pilot on board then the captain fills the duflex capacity, at least so I should consider myself. Produce London Gazette of 29th October, 1880. The information there given leads me to suppose that the danger there mentioned was not known to exist before. 10

Cross-examined--When you come across a body of kelp that is an indication of danger when you see it. As a rule it indicates danger. I have seen kelp where there is no danger. The fact of kelp being mentioned in the notice in the London Gazette would shew that the place was designated as dangerous. It is not the business of a navigator to go amongst kelp. He would keep away from it. Can't say whether the hydrographic sheet of abbreviations is in general vogue. Knows there is one on H. M. S. Rocket; it comes out with the chart book as abbreviation; all our charts are marked this way. The sailing directions tell you to give the reefs a wide berth. The course I have laid out on 20 chart I do not say is a reasonable course. It is not a reasonable course, most assuredly not. I was asked to define the location of the reef. What I call a reasonable course past Entrance Island [witness here marks it on the chart] would take you about a mile from where the Thrasher rock is. I speak of an east magnetic course. I did not make a correct survey of the reef so cannot say if there are other rocks than marked on the chart. I was sent up to ascertain the position of the beacon and the wreck. I most decidedly say that the rock the Thrasher is on is not marked on the chart. I received my instructions in this case as to the survey I made from the defendants. My instructions were to take such observations as would be necessary for the defence in this case. I did not make a complete survey. Here are my instructions (put in.) Instructions as 30 follows:

Victoria, B. C., Oct. 29th, 1880.

Messrs. E. C. Baker and Capt. W. R. Clarke, Victoria.

Gentlemen,—You will please proceed by steamer Etta White this evening to the wreck of the Thrasher off Gabriola reef and make such survey or examination as the instructions on other side call for, and oblige, yours respectfully,

H. Saunders.

“Evidence given—When the Thrasher struck the Etta White was dead ahead of the Thrasher and the Beaver was one point on the port bow of the Thrasher. Find out if the Thrasher had followed in the wake of the Beaver if she would have cleared the rock. Take notice of the kelp, quantity, &c. Find exact position of ship. Also ascertain if 40 beacon is in right position. Find out whether rock on which ship struck is on chart; and take any notes that you may think necessary as mariners for the defence in this case so that you give evidence as experts should it be necessary to call you as witnesses at the trial.”

H. Saunders.

I took notice about the kelp but saw very little kelp indeed. There are times in the year when there is less kelp than at others. I suppose there would be less kelp when I

was there than in July; I can't say. I am not thoroughly posted on these coasts. Have never actually navigated in these waters. As regards these waters my knowledge is not practical to a certain extent, only theoretical. In the notice given in the Gazette of the 29th October, 1880, the directions given to mariners to clear the dangers of Gabriola reef are identical with those in the sailing directions; a re-issue of it. I would not have towed the ship within a mile of where she is. I am to be paid for my professional services to the defendants same as you are for the plaintiffs. I am employed as a nautical expert to assist the defence. Before the pilot districts were split up I was pilot secretary for the whole waters of B. C. There was no practice as to taking pilots; sometimes ships took them, sometimes not. There was a good deal of rivalry between tug boats. 10

Q. Was it not part of the inducement held out that they would save the expense of a pilot by taking a tug?

A. That I can't say. Never in my presence.

Q. But don't you know that was the case?

A. Not of my own knowledge. No.

Q. Isn't that the impression which you formed, that inducements were held out to masters of ships not to take pilots, by the tugs?

A. No. I can't say so; I don't know. I can't swear to anything one way or the other, whether inducements were held out. There may be all sorts of things going on between masters of vessels and pilots. I know nothing about it. 20

Q. Christensen is a pilot, is he not?

A. He is a pilot for the Victoria and Esquimalt District at the present time.

Q. Does he not also hold a certificate for the whole of British Columbia?

A. He has, yes, sir. That license has never been revoked; he was on leave at that time on a request to go as master of the tug; at that time he had authority to go as master of the tug but not as pilot. If the hawser of the tug was on the port bow the tow would have a tendency to sag to starboard but that would depend on the steering. I would counteract it by keeping further off, that is what any prudent man would do.

Re-examined—With promptitude there is sufficient time in half a mile to avoid a known danger. 30

Q. If the master of a ship in broad daylight an hour before the ship went down past Entrance Island saw the ship going E. S. E., stands on the poop for an hour and then went to bed, would you think he acted prudently or imprudently?

A. Most imprudently if I was in pilotage waters whether there is danger or not.

Benjamin Madigan—Was chief engineer of the Beaver at time of the towing and was on watch when vessel struck. Had been on deck several times from the time we left Nanaimo. At the time the Thrasher struck the Thrasher was very much inside the Beaver, closer in shore, a great deal more so than vessels usually are on either side; some kelp straight astern and some a little on one side and some a little on the other. This was very much on one side so much so that I noticed it myself. The Etta White was 40 also inside the Beaver ahead very nearly as much inside as the Thrasher was. The morning after the disaster I heard Capt. Bosworth state that he gave orders to the man at the wheel to steer after the Etta White and not mind the Beaver or old Beaver or

something to that effect. This statement took place on board the Beaver. Christensen, Jagers and Capt. Johnson of the Belvidere were present. Christensen remarked, "That accounts for you then being inside of us all the time."

Cross-examined—Don't know if any one else was on deck of Beaver when Thrasher struck; Jagers steering; wheelhouse is on hurricane deck. Don't know where Christensen was; don't remember how long before I had seen Christensen on deck. The statement of Capt. Bosworth relative to the steering orders was the day after the wreck; I thought that to this steering may be that if the vessel had been as much outside as she was inside that she would have gone safe. Perhaps the reason that no point was made of Captain Bosworth's order to his man at the wheel before the receiver of wrecks on the 10 occasion of the enquiry was that it was not enquired of; I was not there; believe Smith, Christensen and Jagers gave their evidence there; I did not; I was not called upon to give evidence there; can't say that the point was ever debated; I thought myself that if the vessel was as much outside as she was inside she would have gone safe. I am not sure.

Donald Urquhart—Am now in command of the steam tug Alexander. In July last I was a Nanaimo pilot; met Bosworth at Nanaimo; offered my services to him to pilot him to Victoria. He said he could not afford to pay a pilot. I asked him if he wanted a pilot and told him it was the habit of masters of large ships like that and strangers to take a pilot. At that time I had been a pilot about two and a half years. Have seen Gabriola reef a thousand times. Have piloted more than fifty vessels up and down there; 20 been up and down steadily for last two and a half years. I know where the Thrasher is lying; I never saw the wreck; was there last week at very extreme low tide and could not see it. Never knew of a rock existing there. Have taken vessels within a cables length of where Thrasher is; took the steamer Victoria up, a steamer of 1200 tons register; the morning after the Thrasher went ashore I took the Victoria within a cables length of her. I have been up in that direction many times before, as close in or nearly as close in as the Thrasher is. I tow ships now, nearly as close as where the Thrasher is. I came down the other day, last week with a ship in tow within two cables length of her. There was no wind. If the tow wants the tug to change its course the most usual way is to alter the helm. There are various ways of communicating with the tug, but that is the most recognized way so far as I have seen both in the capacity of a pilot and the master of a tug boat. Have been among the reefs in a pilot boat on one occasion; some time in September or October. Noticed currents there tending towards Valdez Island; right along the coast there. The current carried us in four miles in about two hours and a half. When I passed the Thrasher in the Victoria the morning after the wreck we laid by for an hour or two getting stuff out of the Thrasher. I heard Mr. Young the second mate say that their hawser was on the port side of the Thrasher from the port bow and that the Thrasher was steering on the port side of the Beaver. The duty of a tug in regard to her tow is to assist the ship in her voyage, to keep right ahead of the tow. If the tow keeps on one side or the other it indicates that the tow wants the tug to keep right ahead 40 of her. The tug has to keep ahead all the time as nearly as she can. My practice is always to keep ahead of the tow. When I came up in the Victoria the day after the wreck there was a heavy freshet from the Fraser river—fresh water almost all the way to Nanaimo

Cross-examined—Bosworth's reason to me for not taking a pilot was that he was lying a long time at Nanaimo and could not afford to pay a pilot. I will swear that he did not say his reason was that he had two tugs; did not state that that was the reason before Mr. Peck. [Evidence given before receiver of wrecks rejected.] I may have

stated that; I don't say I have not, but Capt. Bosworth's main reason to me was he could not afford the expense. I am not interested in this case only what I hear that you (Mr. T. Davie) in this case is fishing to bring another case that I am interested in. Do not propose to answer any thing about a diffiency I had with the Sumatra some time ago. I do not say that the only reasonable course to bring a ship from Entrance Island is not inside the "see view" line. I came down a mile inside of it and have always found it a safe course.

Q. Would you pursue the same course the captain of the Etta White did here? A. I never found that rock yet.

Q. Don't you think you may find one just like it, if you go inside of the view? A. Any 10 one is apt to find one; there is lots in there to be found yet.

Q. If you keep out, here, you would not? A. I don't know, I might.

Q. There is more liability to find rocks in there? A. It seems so.

Q. Why do you keep a mile inside of where the "view" marked on the chart is? Because it is safe. I know it is safe. I know it by practical experience it is safe.

Q. Your experience is two years and a half? A. No, it is practically four years now.

Q. And yet in the face of what men who have been here twenty years say, you with the experience of four years say inside of that line, is a safe course? A. I don't know what people that have been here twenty years know, I know what I know myself.

Q. There is Capt. Lewis and Capt. Rudlin? A. They know their own way and I 20 know mine.

As a general thing it is usual for strange captains to take a pilot. I do not know that I ever advise them not to.

A. McAllister, a Burrard Inlet pilot—Have been on this coast since 1874; was one of the original owners of the Alexander and was all the time aboard the steamer up and down the coast; I knew of dangers being around in the vicinity of Gabriola reef. Have never seen the rock on which the Thrasher lies. Have been within three-quarters of a mile of the beacon.

Q. Do you believe that rock to be a well known rock? A. Not to my knowledge. If it had been a well known rock I should have heard it discussed amongst the pilots. East 30 magnetic I should consider a good course after passing three fourths of a mile outside of Entrance Island.

Cross-examined—Q. Do I understand you to say that the course pursued by the tugs in this case was a proper course? A. I didn't mention anything about the tugs. I would get my bearings from Portier pass, or if I could see the light I would take bearings from that; on a clear night I would not take any bearings because I could see the land and could see exactly how far it was necessary to go before changing the course. If it was not a fine night I would take my bearings from the light. I would go nine miles from Entrance Island before changing my course. You can come inside of the "view."

Q. How much inside the view? A. If you leave Entrance Island three-fourths of a 40 mile east one quarter south would take you clear of the reef pretty near a mile.

Q. Would you consider it prudent to go inside of the mile? A. We have often done it during the time I was part owner of the Alexander because we have to account for the tides in the different passes, and we have to make time to get to these passes in order to get through on certain stages of the tide. It is safe enough on a fine night to come inside the view, that is when you can see the land. I have been a pilot about eight months. Came here in 1874; that was my first acquaintance with B. C. When I came I went to the mines for about nine months. I first took to seafaring as a business in 1876 since the Alexander was built. After that I went to the mines again for about twelve months and came back and for the last eight months I have been a pilot. The deviation from the straight line between the tug and the tow should not be more than the breadth 10 of the steamer.

Benjamin Madigan, recalled by the court—I am sure that the Thrasher was inside the Beaver fifty feet. I called the attention of Mr. Jagers to the fact. I don't know what he caused to be done; I did not cause anything to be done any more than I noticed she was very much to the side and I called his attention to it.

Henry Saunders, agent for the tug boat Beaver—Remembers the contract with Bosworth on 22nd May, 1880, to tow Thrasher to Nanaimo and back to Race Rocks or Cape Flattery; if to Race Rocks price to be \$500; if to Cape Flattery \$600. I told him if the Alexander was available, if I had any control I would send the Alexander. If not I would send two smaller tug boats. Bosworth asked my advice about taking a pilot; he 20 told me he was a stranger in these waters and had a large and valuable vessel and I advised him and told him to take a pilot at the time we were making this contract for towage. He said he would take one and he engaged Andrew Rogers, a Nanaimo pilot, right then and there in my office. I sent the Beaver up and got the Etta White to assist her down. The Etta White belongs to the Moodyville Saw Mill Co. I spoke to Mr. Rithet about her assisting. There was no written agreement with Capt. Bosworth. It was not necessary because he agreed to take a pilot. The agreements we generally make are similar to those put in signed by Capt. Lewis. We never undertake to pilot vessels. Capt. Bosworth asked me what was the pilotage fees; I told him \$3 a foot and \$10 for the gulf. Have never been paid the towage. The contract was one up and down. 30

Q. The pilot you recommended him to take was for the whole voyage? A. That was for the whole voyage; that was made at the same time; the agreement was made at the same time, and he considered it necessary to have a pilot.

Q. You consider it was more necessary to have a pilot coming down rather than going? A. Yes, sir. Going up he only drew twelve feet, coming down he drew twenty-four feet. All strange vessels take pilots, unless they think they know sufficient of the coast.

Cross-examined—Produces books of towing company; only record of Thrasher contract is the price for towage. No mention of pilotage one way or the other. Have no recollection of advising captains not to take pilots, in fact the reverse. I advise them to 40 take pilots.

By Mr. Pooley—Q. When once the captain comes to your office and he signs an agreement it is nothing to do with you then whether he takes a pilot or whether he does not? A. No, it is perfectly immaterial to me.

Andrew Rogers.—Am a Nanaimo pilot. Piloted Thrasher up last May twelvemonth to Nanaimo. Captain engaged me in Mr. Saunderson's office. Went up the passage inside Gabriola reefs. Offered my services to bring him down. It is usual for the pilot taking the ship up to bring her down. Bosworth told me having been at Nanaimo so long he had been under such an expense he could not afford to pay full pilotage down and also he was going to take two tugs and did not require the services of a pilot. Have heard Saunders advise captains to take pilots. Do not know Thrasher rock. Did not know of the existence of that rock before; only by seeing kelp in the direction.

Q. Have you ever heard that rock spoken of amongst the pilots. A. I did hear of a rock spoken of one day amongst the pilots, whether that is the rock or not I can't say. The 10 rock I heard spoken of was one which a schooner once ran on with a cargo of coal from Nanaimo. I suppose the rock I heard spoken of is one a third of a mile inside of where the Thrasher is; nearer the beacon. I have seen the rock I mention uncovered. I never saw the Thrasher rock uncovered. I should consider east course magnetic after passing Entrance Island a safe course; it is further than I go very often. Have been a pilot only one year and some months; was in the steamer Douglas nearly five years before that. If a tow wishes to signal the tug in fine weather you hail or I might get a speaking trumpet or fog horn, otherwise shape the helm of the ship one way or the other, that generally is the last resource because it stops the progress of both ship and tug. It is the duty of the tug to keep nearly ahead of the tow. If a tow has two tugs ahead it is her duty to 20 follow the one next to her. A tow steering some distance inside of a tug would have a considerable effect on the tug as regards the shore.

Q. From what you know as a pilot in that neighborhood do you consider that if the ship Thrasher had kept astern of the tug as it ought to have done, you would have gone clear of the rock? A. I think if she was considerably astern on the quarter of the boat all the way down from the Island she would have a tendency to bring her in there if she had been just enough to see the mast, clear of all obstructions below, I think she would have gone clear.

Q. What is the duty of the pilot when he is leaving the dock? Does he give instructions to cast off? A. Certainly.

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Q. Does he give instructions to the tugs to go ashead? A. Certainly.

Q. That is the pilot's duty? A. The pilot's duty is to take charge when he goes aboard. If he don't take charge of the ship he don't go.

Q. Some parties have been telling us that kelp is an indication of danger. To what depth in your knowledge does kelp grow? A. I suppose I must have seen kelp 50 or 60 feet long.

Q. In taking up a vessel inside Gabriola reef don't you have to go through kelp there? A. We do.

Q. Have you seen kelp where there is no rock at all? A. I have seen kelp where there is no rock. I don't suppose that is close to the surface. But you can't go through 40 any of these inner channels here such as Mid-channel, Bain's channel, and these inner channels up above Discovery Island you can't go through them without going through kelp. There is kelp in all these channels, especially in the fall of the year.

Q. If you were a nautical man and saw kelp some distance outside of these dangerous marks on the map, it would not necessarily follow there is a rock on the surface? A. Well, I wouldn't run through it.

Cross-examination.—An easterly course from Entrance Island would take you clear of the reefs. If I found out there was a current on the port quarter I would haul her off. On a clear night you can readily see how far you are from the land. I would go a mile or two miles from the land. If there was a mirage along the shore that would form an additional reason for taking bearings.

Q. In case it was hazy along shore that would be an additional reason for taking bearings? A. Of course or how would you know where you are if you don't. 10

John Jagers.—Was mate of the Beaver on occasion of stranding of Thrasher. Didn't hear orders given on starting from Nanaimo but presume there were orders given. Left Nanaimo about 7 o'clock; I was busy around deck after leaving. We were just past Entrance Island lighthouse when I took the wheel; I didn't set any course; she was heading then east by south one-quarter south by the Beaver's compass.

Q. What is the deviation of that compass compared with the chart bearings? A. I couldn't tell exactly what the deviation was; it differs on different points.

Q. What would that make your course by magnetic bearings? A. It would fall out east.

Q. Then as a matter of fact you were going magnetic east? A. I suppose. I stayed 20 at the wheel until after the vessel struck. Steered on that course until shortly before the vessel struck. I couldn't exactly tell how long; a few minutes after we changed she struck, ten minutes, more or less.

Q. Do you know, did you notice the course the Thrasher was towing? A. The Thrasher always kept on my starboard quarter.

Q. Do you recollect Mr. Madigan drawing your attention to that? A. I do.

Q. Was she very much on your starboard. A. She was. I should think a point or more. My duty as regards the Thrasher in steering was to keep ahead of the tow as near as I could.

Q. And if she is to one side or another you try to do what? A. I try to get ahead 30 of her. That is what I did. The Etta White was on my starboard bow; just about as much as the Thrasher, perhaps a little less. I noticed no current until we struck. It was setting in shore. Saw Capt. Bosworth next day on board of the Beaver.

Q. Did he say anything in reference to the course that was being steered in your presence? A. Well, I can say only the same thing that Madigan stated; he told the man at the wheel to steer after the Etta White and not to mind the Beaver. If he carried out those directions from Entrance Island the effect would be to fetch the whole of them inshore more or less. Have steered many vessels down that line from Entrance Island. I have come down inside that line considerably sometimes; never met with any accident on that course; I consider the course we laid that night a perfectly straight course and we kept that way down 40 till shortly before we struck. Was examined at Nanaimo before Mr. Peck. When I was

asked to sign my examination Mr. Peck read over the evidence I gave. I protested against the evidence for he had not put it down as I gave it. He said he would not contradict it; he would not alter it. He told me to sign it. I didn't know any better so I did. He put it down wrong, different from what I gave it. (The following was the evidence before the receiver of wrecks, same put in:)

John F. Jagers, first officer steamer Beaver, sworn,—Left the wharf about seven o'clock; the Etta White was ahead of the Beaver; Capt. Christensen went below after we cleared the lighthouse. Did not give me any particular course but told me to steer after the Etta White. It was a good course. I do not know the coast very well; have not been running here very long yet. We were steering S. E. by E. by our compass. Our compass is out 10 considerably. I do not know how much. Clear and calm night. I did not know enough of the coast to know if we were too far in or not. I did not tell anyone in Victoria that the Etta White was steering too close in. When Capt. Christensen went below we steered E. by S. quarter S. She was heading S. E. by E. after the ship struck. She changed her course about ten minutes before the ship struck. She changed her course to S. E. by E; the ship Thrasher was steering inside the Beaver. The hawser was upon the port bow of the ship. "The ship was steering in a direct line with the steamer but all the time slightly in-shore." Signed John F. Jagers. Sworn to before me this 11th day of August, 1880." "T. Eric Peck," receiver of wrecks.

Cross-examined—The evidence differed as to the course we steered. The course Mr. Peck put down on the paper was not the course I gave him. He refused to alter the evidence so as to make it accord with facts. The course Mr. Peck put down would have taken the ship right over Entrance Island. I don't recollect the course now which Mr. Peck put down. During the towage within a quarter of an hour of the stranding, sometimes the Etta White was ahead and sometimes on the side; most of the time she was a little on the starboard. I followed her as well as I could. At the time of stranding the Etta White was steering near about the same direction as the Beaver. Some two or three minutes after the Etta White changed her course I changed mine to correspond.

Re-examined—Q. When the first tug changes her course does not the second one put her helm over? A. Certainly to come around slightly.

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Q. You didn't change right immediately after? A. No, certainly not.

Henry Smith—Was master of the Etta White on 14th July, 1880, on the occasion of the disaster. At Nanaimo I wanted Capt. Bosworth to go down with me alone, and that when the Beaver came she could come along after us, and help us down the straits. He seemed quite annoyed with me at the suggestion and refused to have anything to do with me. I waited until the Beaver came, I then got the Beaver's hawser attached to the Etta White and the Thrasher's hawser was attached to the Beaver. We started about 7 o'clock p. m. The course we laid after leaving Entrance Island was east magnetic, but I was steering east by south by our compass to make that course good.

Q. East magnetic course, but you were steering east by south by your compass to make that course good? A. Yes sir.

Q. Your compass was out what? A. A point.

Q. Or three-quarters of a point? A. No, a point on that course.

Q. That is the course you always take? A. Yes sir.

We kept on that course about about an hour and a half. The course was changed five or ten minutes before the Thrasher struck. It was quite a clear night. There was a slight haze along the shore, a mirage. The effect of a mirage is to make the land look rather deceiving. I steered all the way myself with the exception of about five minutes before the vessel struck.

Q. What is the reason of your leaving the wheel there? A. Well, the land looked. I looked out of the window and couldn't judge just where I was. I thought I was a long ways below the reef, and to assure myself where we were I just stepped in my room to look at the chart.

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Q. You stepped in the room to look at the chart. Did you see where the tow was at this time? A. No sir.

Q. You didn't notice her on this occasion? A. No.

Q. Could you see her looking astern or was she too far off? A. I could have seen her if I had looked.

Q. What distance was she away? A. I suppose about twelve or fourteen hundred feet.

Q. Did you see her during the time you were going down? A. Yes sir.

Q. Was she steering directly after the Beaver? A. No sir.

Q. Where was she? A. She was steering more after the Etta White.

Q. She was steering after the Etta White? A. Yes sir.

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Q. You were not dead ahead of the Beaver? A. No sir.

Q. When the accident happened your hawser broke, I believe? A. Yes sir.

Q. You went alongside the Thrasher where she was lying? A. Yes sir.

Q. Did you know that rock where she was? A. No sir.

Q. Never heard of it? A. Never heard of it.

Q. Did you find a current there? A. A very strong current.

Q. Unusual current? A. It was, to my knowledge.

Q. A very strong current. Did it have any effect on the Etta White when she turned around? A. I had some difficulty in getting alongside of the ship.

Q. On account of the current? A. Yes sir.

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Q. Was it fresh water there? A. Yes sir.

Q. Where did that current proceed from? A. I presume it proceeded from the Fraser river.

Q. Had it been on your quarter all the way down from Entrance Island? A. Yes sir.

Q. Did you know that current before? A. No sir.

Q. You are not a pilot, are you? A. No sir, only for the tug that was all.

Q. You got a certificate to enable you to run a tug without paying pilotage duties?
A. That is all, yes sir.

Q. If you didn't have that certificate, you would have to pay pilotage duties? A. That is all.

Q. You don't pilot vessels? A. No sir.

Q. You never undertake it? A. I never had a pilot license to pilot vessels.

Q. I think counsel said that there was nothing but a siwash steering? A. We never had no siwashes there.

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Q. Never had one on board? A. Never had any employed in any way up to that time.

Q. That is rather an exaggeration? A. It seemed to me when he said so. There was never an Indian employed on the Etta White in any capacity up to the time of that accident.

Q. How much was the Thrasher on the starboard side when you saw her, the starboard side of the Beaver? A. I should say about a point.

Q. Would that have any effect on the power of the tug to keep her straight, or would it have the effect of dragging her inshore? A. It would have the effect of setting her in shore instead of off shore.

Q. Have you towed vessels any where in the neighborhood of where she is lying now? A. Yes sir.

Q. Often, more than once? A. Yes sir.

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Q. Inside of where she is lying between the reef and that place? A. Yes sir, I think I have, because—I don't know for I never knew the position of that rock before.

Q. You have towed at all events within a very short distance of the Gabriola reef, as marked on the chart, have you? A. Yes sir.

Q. You think within the place where the Thrasher is now lying? A. Oh! inside of that, yes sir

Q. You never saw the rock there? A. No sir, I never saw it, because I know the Thrasher is on top of the rock now.

Q. You had never seen that rock and never heard of it in all the time you have been plying in these waters? A. No sir.

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Q. Never heard of it? A. No sir. I have heard of Gabriola reef often.

Q. You know that on the chart, or on the spot itself? A. Yes sir.

Q. Did you see any kelp about the place when you went down that night? A. No sir.

Q. Did not notice any kelp? A. No sir.

Q. Did your steamer go through any kelp? A. No sir, not to my knowledge.

Q. Is the rock where the Thrasher struck on the chart? A. No sir, not on any chart that ever I saw.

Q. You are quite clear that that is not a portion of the Gabriola reef as marked on the chart? A. I am quite positive that I never saw it on any chart—on no charts that ever I have seen.

Cross-examined by Mr. Davie—Q. How long have you been navigating steamboats here? A. In these waters? Q. Yes sir? A. Four or five years.

Q. How long have you been in your present employment? A. How do you mean?

Q. As master of the Etta White? A. About ten years.

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Q. I thought she came over here about four years ago? A. Four or five years ago.

Q. Then all the navigation you have done on these waters is what you have done in the Etta White? A. Yes sir.

Q. I suppose you are tolerably conversant with the points of the chart and the landmarks in that locality, are you not? A. Well, yes, I think I am.

Q. And you generally find out where you are from landmarks, do you not? A. Well, from landmarks and local knowledge.

Q. You have spoken about the slight haze on the shore this night. Was that of such a character as to prevent you seeing these land marks? A. Well, they would show.

Q. Did they show at all? A. You could see the land, yes sir.

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Q. Consequently you could see the land marks? A. The land marks would appear different in a case of that kind than they would if it was perfectly clear.

Q. Tell us what the difference would be? A. I don't think I could do that. For at different times it appears different.

Q. Couldn't you see the land all the way down? A. Yes sir.

Q. Did it occur to you what it was that was taking you so close to the land? A. I didn't think I was close into the land.

Q. How far did you think you were from it? A. At what time.

Q. During the time you were towing down, what was your average distance from the land? A. Sometimes I was a mile and a half out and sometimes two miles; that depends on the curvature of the land.

Q. At all events you could see it during the whole time? Could you see Cowichan Gap as you go towards Gabriola reef? A. Yes sir.

Q. You could see the gap. Could you see Notch Hill? A. I don't think that we could.

Q. Did you try to see Notch Hill? A. I didn't try.

Q. Did you take any bearings? A. I did not.

Q. Neither from the light or anything else? A. No sir.

Q. How long did Bosworth keep you waiting at Nanaimo? A. I was there several times with him. You mean the first visit? Q. Yes sir. A. I think I got there about three or four o'clock in the afternoon, and we left there about 7 o'clock on the following day.

Q. He kept you about there some time? A. Yes sir.

Q. You were a little annoyed, I suppose, at his keeping you there, when you were quite confident of your towing him down alone? A. Yes sir.

Q. I suppose you had other contracts, other business; you wanted to be attending to other affairs? A. I don't remember just now.

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Q. You did not want to be stopped at Nanaimo? A. No.

Q. What was your object in shaping your course east? A. Because I thought it was the proper course.

Q. Will you show us about the place where you changed your course east? A. Well, it would be along about here; half to three fourths of a mile off the lighthouse. That is, I changed my course east magnetic; but I changed it east by south'ard by our compass.

Q. Where was it you changed to east south east? A. I thought I was down about here.

Q. Show the jury where you changed it to east south east where you thought you were? A. Here is where I thought I was, about there (marking on the chart.) There is not where I was, but where I thought I was.

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Q. What was the direction you were steering before you got there? A. East magnetic.

Q. That is how you were shaping to steer? A. Yes sir.

Q. Had you any idea of going through Cowichan gap? A. No sir.

Q. No idea at all of going through? A. No sir.

Q. How do you account for being so much out of your course you say you were at that point? A. By the current.

Q. For which you had made no allowance? A. For which I had made no allowance. I knew nothing about it, that is the current that was setting in the direction it was.

Q. Have you seen the same kind of a current this year? A. I have not been up there this year.

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Q. Had you never seen it previously? A. No sir.

Q. Now, when you left the wheel to look at the chart, who did you put there? A. I put one of the deck hands there.

Q. How many deck hands did you have on watch at the time? A. One.

Q. What was the state of the tide at the time the ship struck? A. It ought to have been ebb tide.

Q. What was it? A. I think it was ebb tide.

Q. Did you look and see? A. I presume I did at the time.

Q. You say you noticed this deviation in the course of the Thrasher, that is that she was steering to the starboard. How long was that before she struck? A. It was an hour or more.

Q. Was it a very marked deviation? A. I can't say as it was at that time.

Q. Did it become more marked? A. I didn't notice her after that.

Q. Was that the only time you observed it? A. Yes sir.

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Q. Did you consider that as improper steering at all on the Thrasher's part? A. I can't say as I did.

Q. If you had considered it improper you would have hailed the ship or something of that kind and told her to steer differently, would you not? A. Oh! no.

Q. You wouldn't? A. No sir.

Q. Even if she had been steering improperly, you wouldn't? A. No sir.

Q. Isn't that the usual course, if the ship is steering improperly, for you to give some directions as to how she should steer? A. No sir.

Q. You have never done it? A. No sir.

Q. When other men say they would do so, that is not correct? A. I have not heard 20 any one say so.

Q. Did you hear Capt. Rudlin say that if he was on board of a tug and saw the ship steering improperly, he would at once hail her? A. He might do so.

Q. You wouldn't? A. No sir. I wouldn't tell another ship how to steer.

Q. What would you do if you saw she was pulling inshore from the effect of the steering? A. If I know she was going into danger I wouldn't take her there.

Q. What would you do? A. I would either stop, or I think I would stop altogether.

Q. Wouldn't you haul a point further seaward or something of that kind? A. Likely I would.

Q. You wouldn't give the ship any directions as to her steering, inform her she was 30 steering badly? A. If I saw she was going into danger I might.

Q. If it was a question of impeding you in the way you were going? A. No, I don't think I would.

Q. At all events you tell us this is the only time you observed how the the Thrasher was steering and then she was a point out? A. I didn't say she was steering a point out; I say she was probably steering a point on the starboard side.

Q. That was an hour before the accident? A. Oh! yes, more if anything.

Q. Up to the time of the accident you didn't notice anything more again? A. No sir.

Q. You say you knew nothing about this rock; were you ever aground outside of the place where the Thrasher is, to the port side of her? A. The next morning following, I took a scow down there.

Q. Following the loss of the Thrasher? A. Yes sir, and the captain of the Belvidere Capt. Johnson, and another captain, I forget who it was, wanted I should bring this scow up to the stern of the Thrasher to put her anchors and chains in. The vessel at the time she struck this rock was heading down the Gulf of Georgia. The tide afterwards, the next day, swung her inshore; she is now lying near due north and south just in a right 10 angle of the position to what she was first. I tried to get this scow up to her, trying to get a line astern. I couldn't do everything, and stopped the motion of the boat, and was immediately set right in towards her bow and they contended a little with me, in getting her up there, so I took more chances than I ought and went up, and when they got the line the steamers keel caught. I immediately sent a line to the Beaver and took it to the captain and we heeled off. Probably we were down there twenty minutes.

Q. Were you not ashore there for three or four hours? A. No sir, no living man ever saw us there.

Q. You were about twenty minutes ashore? A. Yes sir.

Q. This was outside of where the Thrasher was? A. Yes sir. 20

Q. How many feet of water do you draw? A. Eleven feet.

Q. What time did the hawser part between the Beaver and the Etta White? A. A little after ten.

Q. How far did you go after the hawser had parted? A. Didn't go a great ways.

Q. Were you aware when the hawser parted? A. Yes sir.

Q. Did you take any steps to find out the distance you had actually travelled? A. That is what I went down for.

Q. Before that? A. No sir.

Q. You say you went to examine your chart to see how far you had travelled? A. Yes sir. 30

Q. Why did you not examine the land marks? A. Because there was so much haze.

Q. Could you have seen Cowichan gap or Portier Pass? A. I wasn't far enough.

Q. You tell us when the ship struck you could see the Cowichan gap and Portier Pass? A. Yes sir.

Q. The weather could not be very hazy if you could see Portier Pass? A. Portier Pass is much more prominent than any other landmarks along there.

Q. Could you not tell from the direction Portier Pass was, whether you were within your proper line, or whether you were not? A. Not exactly.

Q. You have seen Richard's book of directions, have you not? A. Yes sir.

Q. You know very well if you keep Portier Pass just touching and working up by the summit of Gabriola Island inside Berry Point, is open clear of the Flat Top Islands the reef will just be cleared? You knew very well if you kept Portier Pass touching, you would be correct? A. You can't see those points in the night.

Q. You told us just now you could see Portier Pass? A. So I did see Portier Pass.

Q. Wouldn't that have told just where you were? A. No sir. It would in daylight, if you could look through the Pass.

Q. You tell us you could see Cowichan Gap? A. Yes sir, but you couldn't see exactly those lines.

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Q. But you could see the gap? A. Could see where it was, yes sir.

Q. Well, was that open? A. It was not so I could look out, I don't think.

Q. Didn't that fact of itself show you that you were a great deal further inland than you ought to have been when you could not see Portier Pass open? A. No sir it didn't.

Mr. Davie—Q. You know very well to keep Portier Pass open will always clear Gabriola Reef? A. Always keep clear of the reef.

Q. You suspected land when you found you could not get those points open? A. I thought from the way the land lay at the time it occurred to me we were rather close in.

Q. How long before the accident did you think you were rather close in? A. About five minutes I think.

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Q. And then in order to find out where you were you went to your chart. Why is the reason you didn't take some of these landmarks? A. Well, I didn't think it necessary.

Q. What was the necessity of your going to your chart then. To find out how far you had come? Would it not be a much longer process to go to the chart than to take the bearings of some of these points? A. No, I don't think it would.

Q. Couldn't you tell exactly how far you came by taking bearings from Entrance Island light? A. I had no exact way of taking bearings.

Q. How were you going to ascertain from your chart how far you had travelled? A. Well, I thought I could ascertain by the distance we had travelled down there.

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Q. You say you went to the chart for the purpose of ascertaining how far you had travelled? How were you going to ascertain from the chart how far you had travelled? A. Well, I should judge from the speed we had been making.

Q. How were you going to find out from the chart the distance you had travelled? A. I knew that we were here (showing here) about a little after eight o'clock and this was ten, and I thought we were going about six knots, and I thought to space that off, it would tell me how far I was down.

Q. At the same time you say you thought you were rather close to the shore? A. Yes sir, I did think I was rather close to the shore.

Q. Did you calculate when you went down this course, that you were inside or outside this "view" when you came from Entrance Island? A. Well, I calculate to be on it, that is what I thought.

Q. When you were on the "view" could you see the land very plainly? A. Yes sir.

Q. How far is that from the land. About a mile and a half or two miles? A. About two miles I should judge.

Q. But now, as a matter of fact, knowing what you have since discovered, how near the land were you during the whole time when you came down there? A. I was not looking at the land the whole time, I had something else to do. 10

Q. When you found that the tide was carrying you in here, which you didn't know anything about, how far do you consider now you were from the land? A. How do I know when I was not looking at it.

Mr. Drake—Q. You say you caught the keel of the Etta White in getting that scow alongside, how far is that from the Thrasher? A. Just the length of the steamer, about 90 feet.

Q. You found fresh water along there didn't you? A. Yes sir, the water was fresh.

Q. You used it for your engine? A. Yes sir.

Q. Used it for the boilers I should say? A. Yes sir. 20

John G. Barnston, barrister at law, residing at Nanaimo. Appeared at the enquiry before Mr. Peck on behalf of the Etta White—Remember Jagers being examined and Mr Peck reading the evidence over. At the time the evidence was read over an objection was made to the correctness of the evidence as taken down by Mr. Peck. I think the objection was made first by myself, Mr. Jagers concurring in the objection. I do not think Mr. Peck altered the deposition. The objection was taken before the signature. Mr. Peck insisted that the words of the witness were correctly taken down. I was instructed not to press the point and I desisted in the objection. Mr. Jagers was self possessed enough; neither did he appear to be very much confused. He said there was an objection to the evidence and objected himself, but he did not persist in it. 30

Cross-examined—I think it was Captain Smith who instructed me to waive the objection to the evidence.

William R. Clarke—Am an auctioneer at present; hold a master's certificate, 25 year's experience in the navy and mercantile marine. Been second in command of a steamer on this coast for about twenty years. Was in the Forward gunboat when we arrived and afterwards in the Sir James Douglas. Know all these waters very well. Am a member of the Pilot Board; know the charts; know the abbreviations; have seen the place where the Thrasher lies. I went with Mr. Baker when he made his survey; I was sent to assist him. He went to find out the exact position of the Thrasher. Mr. Baker took the angles, I took the degrees, while he called the angles out I marked them down. 40 I never in my experience knew the rock where the Thrasher lies; I have been around in that direction but not close enough in to find it. I have never seen it and never heard of it.

Q. From your experience, if there is a strong current setting across the Fraser river on to these reefs and a heavy loaded vessel steered to the starboard, would that have any effect of drawing the tow boats off the course that they reasonably laid down from Entrance Island? A. Most certainly.

Q. They would still really keep head to the proper course, but sag in? A. Sag in, they would sag in to the starboard the whole time.

Q. But by the compass? A. They would be still pointing their course.

Q. What you call drifting to leeward isn't it? A. Drifting to leeward. If she was steering east and still sagging in she would be steering to east still. It would all depend upon whether the captain or the pilot is doing his duty to watch that sag. 10 She would be steered E. N. E. perhaps to make east good. If a vessel is making four knots an hour and the tide making two the vessel is sagging into the land two miles an hour. I think the duties of the master of a merchant ship are very responsible. In the first place I should no more think of leaving Nanaimo with a vessel of 24 feet of water under my foot without a pilot, without I wished to consider myself a pilot. I consider that the captain who leaves a harbor without a pilot should have five or ten minutes consultation before leaving the wharf, directing what course he should steer and where the vessel should be put, through what passage, and the captain to attend to the whole business until he was in safe ground. That is the duty of that captain and if he does not take a pilot the responsibility is his and the command of the steamers, if there are a dozen, are 20 under the command of the captain of that ship who represents the pilot. There is only one man on board his ship and that is Captain Bosworth. The captain ought not to have gone to bed. He ought to have dictated the course before he left; and another thing, he goes past a lighthouse three quarters of a mile off; there is no bearing taken; he then goes along when he could have done it he ought to have dictated the course to the steamers. He ought to have taken another bearing again and find which course he was going. It is not the business of the steamers to find what course they were going, but he was to tell the course, find what course he was going down in that channel. The tug boats are responsible for themselves alone. If the hawser broke and if the wind came on, or the fog come on what does Captain Bosworth know about it? He is absolutely jeopardizing 30 a hundred thousand dollars belonging to other people because he didn't take a pilot. A course magnetically east, such as has been described in evidence here with vigilance would have been a correct course, because the captain or pilot would have watched, but if it were me I should not go so near; I have laid down Mr. Baker's line that he has laid down with reference to the sailing directions. Mr. Baker consulted me on those directions. I might say Mr. Baker did the whole work. I checked him and put down his angles as he read them off. Those directions are for every class of vessel, particularly for sailing vessels; steamers can go a great deal closer. I know Capt Urquhart; I made him a pilot; he is a good pilot.

Q. He said in his evidence he has gone frequently within a cable length of where 40 the Thrasher is now lying? A. I don't know, I might have taken the same risks myself but I never did.

His Lordship—You wouldn't do it on purpose? A. No my Lord, I wouldn't do it on purpose without it was blowing very hard. Urquhart is a good pilot and a safe man. I can say his local knowledge for the short time he has been there is equal to those who have been there three times the time he has.

Witness—I may add my Lord and gentlemen that the reason I have not gone closer in, I have simply followed the "Vancouver Island Pilot." I have never gone closer in than the marks that have been made. If I had been in distress I might have gone in there too.

Mr. Drake—There are no marks on the chart at all events. The line on the chart shows that there is a limiting danger line? A. Yes sir.

Q. Have you seen the chart that there is a circle with "2" under it to the south of this reef? A. Yes sir.

Q. What is the meaning of that? A. It means that that is the extent of danger.

Q. No, no, look at the chart will you? You will see underneath that there is a little circle? A. Round the reef?

Q. No, underneath it, to the south of it. What does that mean? A. That means a rock.

Q. Unknown rock? A. Unknown rock.

Q. Probable rock? A. Probable rock, danger there is on the inside; that is a rock. Eleven fathoms are marked on the chart where the Thrasher lies. From my experience as a pilot and nautical knowledge if there is a pilot on board the pilot takes command of the ship under the superintendence of the captain, the responsibility never ceases. The pilot gives the orders to cast off. If the pilot is not there, I suppose the captain gives his orders to his first officer, and then he takes command, he takes the pilots place, but 20 the captain's responsibility never ceases until she is back to her own home, and in the shipmaster's hands, and he is on leave.

Q. When you were up on this expedition with Mr. Baker did you find a channel lying between the reef and where the Thrasher lies? A. We did and anchored in seven fathoms, midway between the big reef of Gabriola Island and the Thrasher; the smallest water we had there was five fathoms or five and a half. Lots of vessels have gone through there; numbers of men in this place have taken ships through there.

Cross-examination—Q. Are there not several points in the vicinity of these reefs as known where you can get seven and eight fathoms of water? A. I am not aware; the only time I told you I have ever been there is when I was with Mr. Baker. That is the only 30 time I ever was near the Gabriola reefs at all. I am not aware that there are channels running between several of thereefs. In the sailing directions you will see that the dangerous cluster of rocks is half a mile only—the Thrasher rock if included is only a mile. I obtained my master's certificate in the Royal navy. My position in the navy is a gunner and a sailor too.

Q. All men are more or less sailors? A. No, there are some that are better sailors than others. I consider myself one of those. I was employed on the gunboat Forward not as navigating lieutenant but as gunner. I assisted the captain in navigating the ship from Rio for six weeks when the captain was laid up on his beam ends, with a broken chronometer too. When I was engaged in the Douglas her course was inside Gabriola Islands altogether, 40 not going through the straits of Georgia at all but going out into Stewart's and other channels. Have been at Gabriola reef a hundred or more times. Have towed ships up and down. I always obeyed the sailing directions; they are when you go up. I generally keep

mid-channel and when I got up abreast of the Flat Tops and take hold of Berry Point on Notch Hill in day light, and if it were night I went out into the middle of the gulf the same as any commander would.

Q. Any prudent commander? A. Yes sir, a man who does his duty, shaped a course and gave his directions. I have often experienced currents there. I suppose all sailors have more or less. I always obeyed the pilot or the commander of the ship that I was towing and I made arrangements with that commander before we left port how we were to steer, where we were to go, and what was to be done generally. That was the arrangement made before I started and every good commander does the same thing, or otherwise he gives no course, and five minutes before leaving the dock, that makes all the mischief. 10

Q. When you were towing along there in a ship, where you mention, and when you observed the current setting in there what would you do, in order to prevent the effect of that? A. You must consider I am no sailor at all. What is the use of humbugging me this way. I should simply put her a port and take her out. You don't suppose I am a ninnie with my 21 years' experience in this country. I am not going to be turned around, and twisted, and distorted. I don't think it is right. I shall appeal to His Lordship if I am to be asked any more such questions.

Q. You said you would put your helm a port if you found the current setting in; would you have any difficulty in ascertaining. Did I understand you to say you would put your helm a port? A. Yes sir, I did. 20

Q. And then you would go further in land. Would not putting your helm to port, if you were steering with the wheel, take you in shore? A. You don't appear to understand. You know the wheel gives the reverse.

Q. Would not putting your helm a port take you in shore? A. Perhaps I made a mistake between port and starboard. Yes I have made a mistake. I felt so annoyed by your cross-examination that I made the mistake. You should put your helm a starboard to keep out.

Capt. George Faulkner—Master of City of Quebec, 22 years at sea; would not going into strange pilotage waters attempt to take my vessel without a pilot. Should consider it my duty before leaving a port in pilotage waters to lay my course, and know where I was going from the pilot. Should consider it my duty to see the ship was making a good course, 30 to keep clear of all dangers at all times. My responsibility never ceases whilst I am in charge of my ship, pilot or no pilot.

Q. Would you consider it the duty of a master in charge of a large vessel like the Thrasher, a ship and cargo worth a hundred thousand dollars, would you consider it your duty as master of that vessel to go to bed, in strange waters, without having laid any course, and not knowing where you were going? A. Decidedly not.

Q. Would you consider a master who did any act of that kind guilty of negligence? A. Most gross negligence.

Q. What would you expect would happen to you as master of the vessel if you did a thing of that kind? A. I should expect to have my certificate cancelled, severely reprimanded, 40 and my prospects ruined for life.

Q. Nothing to prevent you from piloting then if you want to? A. Still we don't expect to pilot there without getting paid for it.

Q. Still you are competent to do so if you choose? A. I suppose so.

Q. What is the ordinary way of testing a ship's compass and the deviation of them? A. It is by swinging the ship round.

Q. How long before the Thrasher accident was it that the Beaver was swung round? A. Well, swung round a good many times, sometimes they swung around in 24 hours half a dozen times; she was not swung for the purpose of testing her; but when I had her on a different course.

Q. She was not swung for the purpose of testing her compass? A. No.

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Q. When was she swung for the purpose of testing her? A. That I don't know, I can't say.

Q. You have done a good deal of towing? A. Well, I had not done a good deal of towing then.

Q. Isn't it the usual course when you find a ship is sagging to one side or the other to counteract that by the movements of the tug? A. Yes sir it is the course, of course. It is usual to counteract when it is thrown out.

Q. Do you know whether any effort was made to counteract the sagging of the ship in this case? A. I couldn't say.

Q. If you had been on deck and observed the ship sagging towards shore, or keeping 20 as described, would you have done something to counteract that? A. Not without orders from the ship to have done so.

Q. Would you not call the attention of the ship to it? A. I would not.

Q. Would you not, knowing it is a dangerous thing for the ship to do? A. Well, it might possibly be then.

Q. If you had seen she was liable to cause any danger, would you cause something to be done to counteract it? A. If there was any danger to the steamer I had charge of, I would most certainly have avoided that danger.

Q. Would you not also to the ship? A. I had no charge of the ship; I could not dictate to the ship where to go.

30

Q. You would have warned the ship? A. I didn't consider it was my place to interfere with the ship.

Mr. Drake—Q. What water does the Beaver draw? A. Ten feet.

Capt. James Ramsey—A British Columbia pilot; have been so for a good many years; have piloted many vessels between Victoria and Nanaimo; am not a Nanaimo pilot; never saw the Thrasher rock before; I have been very close to it but have never seen it. I piloted the Victoria out of Fraser river the morning after the Thrasher struck and passed close to her; the current was very strong on that day; I had no difficulty in bringing the Victoria out on that occasion; the gulf was full of fresh water; it was sending fresh water

all through all the passes at that time all around where the Thrasher is now; have always had the tugs under my directions when piloting; the pilot takes his place on board the ship; in signalling the tugs sometimes you cannot make them hear, at night especially; when there are very few men on deck on board of the tug and they are not going according to the pilots' directions all he has to do is to put his helm hard to starboard or hard to port, that would turn them right around I have commanded tugs.

Cross-examination—Q. Is that current you speak of unusual about the time of the year that you mentioned? A. There is a few months in the year when the Fraser river is high, that current is always there; it is there now; June, July and August you will always find it there, sometimes later than that, sometimes earlier. The time I towed a 10 ship near the place where the Thrasher lies was when the Victoria came down. I came within about a cable and a half of where she is lying. I considered it safe at the time. I was a good way within the "see view." It was in the day time; I would not likely be so close in at night. I would be a great deal further out. I have seen a great many of the rocks round where the Thrasher is. I have not taken any particular soundings around them. It was not my business to do so. It is customary for vessels in tow to take pilots and the pilot has charge of the ship.

James Douglas Warren—Have been engaged master of towing vessels four years or more. In command of Beaver three years before Thrasher accident. Have towed and piloted vessels to Nanaimo and back; never heard of the rock that Pamphlet and others 20 speak of until the Thrasher struck; have never seen it; have towed within half a mile or less of it. Recollect seeing schooner Experiment on Gabriola reef. The rock on which she was must have been at least 600 yards from where the Thrasher is. I should consider it the most northern rock of the reef. Do not know from personal experience how far the Thrasher is from the beacon but she is a long way off. The variation of the Beaver's compass differs in different localities. On an east course the variation would be about a point and a half. I have ascertained by steering courses repeatedly and repeating, steering courses and comparing it with courses on the chart by taking them from the chart. Have been coasting on these waters more or less since 1858.

Cross-examined—I have been in most all the waters in British Columbia. I never 30 went in where the Thrasher is to take soundings prior to her wreck; never went there and stopped over a tide. I passed there so often that I should think I would have seen it, but I never have. I know that the admiralty circular states that it dries at low water a foot and a half, but that must be only two or three times a year at extreme low tide. I have never been through inside of the Thrasher channel, but I have been inside Gabriola reef; About two years ago since Experiment was ashore. I only saw her in passing; I could see the rock, it was bare; I am a member of the defendants company, the "Towing Company"; I hold a certificate to pilot my own ship. I have towed numbers of ships up and down to and from Nanaimo without a pilot.

Henry S. Mason—A barrister; was the commissioner who took the evidence of Bos- 40 worth and Larsen; on the occasion of taking the evidence the seaman Larsen had just stated that he was told by the captain to steer after the Etta White and not to take any notice of the old tug Beaver, that she could not steer; that she did not steer well. Then the captain speaking to the witness under examination said, "Why do you say that," or words to that effect. Larsen came forward a step or two and said to the captain, "Didn't you tell me to steer after the Etta White and not after the Beaver." Capt. Bosworth said "Well, perhaps I might have done so," or words to that effect.

The London Gazette, October 29th, 1880. (5477) Notice to Mariners. (10,193) North America—West Coast Vancouver Island—Straits of Georgia—Gabriola Reefs.

Information has been received that the beacon erected by the Canadian Government on Gabriola Reefs, near the eastern end of Gabriola Island, stands on the largest ledge which covers at six feet rise of tide. At the distance of nearly six cables N. 15 deg. E. from this beacon and about two cables' length seaward from the end of the Gabriola Reefs, a detached rock which dries 1½ feet at low water, spring tides, has been found in the kelp which marks the neighborhood.

There is 11 fathoms within a cables' length of the rock on its seaward side and between it and the Gabriola Reefs there appeared to be a depth of about five fathoms over 10 a rocky bottom.

Berry Point bearing W. ½ S. (well open of Flat Top Point) leads about 1 mile northward of Gabriola Reefs and the above detached rock. The entrance points of Portier Pass just touching on a S. S.E. ¼ E. bearing lead eastward of the reefs.

[Pilotage Certificate of witness Scott, produced by him in evidence.]

Dominion of Canada. Pilotage District of British Columbia Licensed Pilot, No. 11.

We, Roderick Finlayson, William Raymond Clarke, and John Devereux, B. C. Pilot Commissioners, being the pilotage authority having by law power to examine and license pilots for the Pilotage District of British Columbia, do hereby certify that William Scott, of Victoria, B. C., having been duly examined by us has been found in all respects duly 20 qualified, and is deemed by us to be a fit person to undertake the pilotage of vessels of every description within and throughout the said pilotage district of British Columbia, and on this fifteenth day of October, A.D. 1877, is by us licensed to act in that capacity.

This license cannot be lent or transferred."

"ROD'K FINLAYSON,"

"W. R. CLARKE,"

"JOHN DEVEREUX."

Registered 22:5:78.

EDGAR CROW BAKER, Secretary.

[Description of William Scott.]

The Judge charged the jury and left to them the following questions, which were answered as shewn. The Plaintiffs' Counsel took several exceptions and required additional 30 questions to be submitted.

BY THE JURY.

Question—Did the defendants, or either, and which of them, at any time contract to tow the "Thrasher" from Nanaimo to Fuca Straits without a pilot engaged as such by the "Thrasher?"

Answer—There was no contract made by either of the defendants to tow the Thrasher from Nanaimo to the Straits of Fuca without a pilot, neither was there any direct stipulation in the contract which was made between Captain Bosworth and (the agent) Mr. Saunders, of the British Columbia Towing and Transportation Company, that the vessel should take a pilot.

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Q.—What was the magnetic compass course taken by the tugs from Entrance Island?

A.—The magnetic compass course taken by the tugs was about due east from Entrance Island, which course was changed by the "Etta White" some ten minutes before the "Thrasher" struck.

Q.—Was any specific compass course (or any other course) given by the tow to the tugs, either by the captain or other officer?

A.—No course of any kind was given by the tow to either of the tugs by Captain Bosworth or any of his officers.

Q.—At what time did the captain of the "Thrasher" go to bed?

A.—We are of opinion that Captain Bosworth left the deck about a quarter to nine o'clock. 10

Q.—Did the captain of the "Thrasher" direct his steersman to neglect the "Beaver's" course?

A.—Captain Bosworth did instruct his steersman not to follow the course of the "Beaver" but that of the "Etta White."

Q.—Was there any current and in what direction? Would it have been probably noticed and allowed for by a competent pilot on board the tow or either of the tugs?

A.—There was some current setting in shore and we are of opinion that same would have been noticed and allowed for by a competent pilot either on board the tow or either of the tugs.

Q.—Was the "Thrasher Rock" a generally well-known rock previous to the accident? 20

A.—We are of opinion that the "Thrasher Rock" was not generally well-known prior to the accident.

Q.—Did the Captain of the "Thrasher" follow a reasonably direct course after the tugs?

A.—We are of opinion that the captain of the "Thrasher" did follow a reasonably direct course after the "Etta White" but not after the "Beaver."

Q.—Did the accident take place with the actual privity of either of the defendants?

A.—The accident did not take place with the actual privity of either of the defendants.

Q.—Did Captain Bosworth take proper and what precautions as captain of a tow should, such as to take notice of the rate and real direction of the progress? 30

A.—We are of opinion that Captain Bosworth, as captain of a tow, did not take proper precautions as to noticing rates of speed and real direction of his vessels progress.

Q.—At the time of the stranding what was the value of the "Thrasher," of the cargo of freight; if no evidence, say so?

A.—There is no evidence to show the value of either ship, cargo or freight at the time of stranding. [Signed], H. BROWN, Foreman.

On the 4th and 7th days of July, 1881, the Plaintiffs, pursuant to notice, duly applied to the Chief Justice to enter judgment for the plaintiffs for \$75,000, but on the 11th day of July, 1881, the Chief Justice, upon such motion, directed judgment to be entered for the Defendants, and the following is such judgment.

[NAMES OF PARTIES]

Monday, the 11th day of July, 1882.

The action having on the 26th, 27th and 28th days of June, A. D. 1881, been tried before the Honorable Sir Matthew Baillie Begbie, Knight, Chief Justice of the Supreme Court of British Columbia, and a special jury of Victoria, and the jury having been discharged without finding a verdict expressly either for the Plaintiffs or Defendants, but having answered certain questions put to them by the Judge as appears by the certificate of the Registrar, and now upon this day motion is made to His Lordship the Chief Justice, on behalf of the Plaintiffs (pursuant to notice duly given in that behalf) to enter final Judgment in favor of the Plaintiffs for the sum of seventy-five thousand dollars and costs of suit, and the said motion having been debated by the Counsel on both sides, His Lordship did adjudge that judgment should be entered for the Defendants with costs of suit. Therefore it is adjudged that final judgment be entered for the Defendants, and that the Plaintiffs do pay the Defendants their costs of suit, to be taxed by the Registrar.

By the Court,

[SEAL]

JAMES CHARLES PREVOST,

20
Registrar Supreme Court, B. C.

And the reasons for such judgment are as follows:

This is an action for damages by a tow against two tugs, the tow having been taken on a rock, which I shall call the "Thrasher" rock, as the plaintiffs allege by the negligence of the tugs. The tugs put in several defences; they deny the negligence; they allege an unusual current; they allege that the rock was an unknown danger; they allege that the accident was due not to their own negligence (if any) but to the negligence and errors on the part of the tow—active error in that the tow mis-steered and otherwise failed in her duty; passive negligence in omitting to take a pilot to keep on the course taken by the tow. The case, as regards the facts, was discussed for some days before a very patient and intelligent jury, who found several facts, I think in answer to 9 or 10 questions, some of which, however, they left in doubt, but not material questions, or such as I shall hesitate to form an opinion upon myself.

The first matter to be decided on, is as to the cause of the accident. Negligence, somewhere or other, there must have been to run on the "Thrasher" rock on such a night. The negligence alleged against the tugs is, that they did not take and keep a proper course, according to the sailing directions from Entrance Island, and that they openly steered into a well known danger on a clear, calm, bright moonlight night. I do not think any other negligence is alleged on the tugs. The onus of proving this negligence is on the tow. (Spaight and Tedcastle, per Lord Blackburn.) The fineness of the night is admitted, but of the other instances of negligence two are negatived, and I think on the evidence, most properly negatived by the jury, who have found that the "Thrasher" 20 rock was not generally known, and that the tugs laid a proper and safe course from Entrance Island: viz: E. or E. $\frac{1}{4}$ N., magnetic. It is quite certain that the plaintiffs' third allegation is correct, viz:—That this proper course was not made good, although it is in evidence that the tugs adhered to this magnetic course by compass; but the course actually made was deflected by causes which I shall consider presently. The jury, however, find, and I fully agree with them, that this deflection, and the unusual circumstances likely to cause it might have been noticed by any competent pilot or seaman on board either of the three vessels. I suppose that if any person on board either of the three vessels had taken a back bearing of Entrance Island light, it would have been at once apparent that they were not proceeding E. magnetic from that point, that they were 30 departing from the course first laid and which is recommended in the sailing directions; and witness after witness said that any intelligent school boy of 15 could have told them that they were so departing. It is, I think, disproved that the tugs knew they were going into danger, and in fact there was no apparent or known danger. They struck 1200 yards N.E. of the beacon on Gabriola Reef, but it is quite clear that they were not proceeding according to the sailing directions and that they might have easily recognized that fact. In my opinion that is negligence on the tugs. Was it this negligence which caused the accident? I think negligence may be of two sorts. Simple neglect, as the neglect of the tugs in this instance to take a glance backward over the compass towards Entrance Island light, or a glance over the side of the vessel to see whether there were any signs of a 40 freshet, which, though unusual generally, might surely not to be unlooked for at the time of the year. I do not think any other sort of neglect is to be attributed to the tugs.

The other sort of neglect is, a sin against knowledge, as where a tug hears but deliberately disobeys the orders of a pilot. (Spaight vs. Tedcastle, 6 App., Ca. 220) or deliberately sails on the inside of a known beacon. (Robert Dixon, 5 P. D. 54.) This is evidently a neglect of a much higher degree of culpability and indeed different in kind. It is the "culpa lata" of the Roman law (incorporated in our maritime law) "que aquiparatur dolo" (i. e.) which is deemed as bad as a fraud. And Lord Blackburn 6 App. Ca. p.

226) seems to say that even contributory negligence in a plaintiff cannot avail as a defence against the consequence of negligence of this kind in a defendant. The cases are many in which the relative duties of tug and tow are spoken of by the judges. I do not know of any in which any full and decisive definition has been made necessary for the judgment delivered. The law is doubtless often laid down, but in general terms, and each judge speaking with reference, indeed, to the case before him and influenced by its circumstances, but not deciding any point necessary for his judgment. Accordingly we find detached expressions by the judges of the very highest eminence which may be quoted in favor of the tug and others in favor of the tow. A great question in such cases generally is: Who is responsible for the course laid and made? The tow or the tug? Perhaps the custom in particular ports might in time acquire considerable weight, and I was informed as a matter of fact that the doctrine in the U. S. courts upon some points of towage differs from our own, and there seemed to be some difference of opinion not unusual in a collision case among the nautical witnesses here. I think that this would be a very mischievous notion to encourage. It would be most embarrassing if captains of different nationalities coming to distant waters were to find any peculiar rule in force, nor do I believe maritime law to be so uncertain.

The contract of towage is merely a contract to supply motive power. It is not a contract of pilotage at all. Neither can it now be argued that the tug impliedly contracts to tug safely. That would be a contract of pilotage of the highest degree. The only implied contract on the part of the tug in that relation is that it will not exert its powers in a way of danger manifest to any person possessing a local seaman's common knowledge (not a pilot's local knowledge) will not run on a well known rock or on the wrong side of a visible, known beacon. Having to provide power, she is bound to find sufficient coal or steam, hawsers of proper strength and fittings, and competent engineers and crew sufficient to work the tug herself, with a steersman to follow the course approved by the tow, and to look out for known dangers, and she is bound to obey all reasonable orders from the tow. I do not know that she contracts for anything else. But the tow also has duties to perform to the tug. It is her duty to her owners as well as to the tug to watch the course laid; to watch the course made, the state of currents and weather, and the indications of them, the rate of progress through the water and past the land, the distance from the shore, the soundings if necessary, as well as any visible or indicated dangers ahead, and to consult all the means, (e. g.) charts, sailing directions, compasses, etc., with which a well found ship is provided, to judge of these points. When the tow takes a pilot, even in compulsory pilotage waters, (which these are not) it is still the duty of the captain to see to these things, and in addition to see that the pilot sees to them. And it is the duty of the tow to the tug to direct the course which is the object and outcome of all these observations, and to communicate with the tug if any observed circumstance indicate danger. These duties are reciprocal and if either tug or tow fail in her duty and damage accrue to her in consequence she cannot complain. If for instance the tug run short of coal, and she does not inform the tow and loss ensue she cannot say, "If the tow had ordered me to go half speed or to wait for the tide at such a place my coal would have sufficed." It seems very obvious that the duties here assigned to the tow can be much more efficiently performed by her than by the tug. The tug has a much smaller crew, a less commanding height of observation, possibly no charts and generally carries no pilot. She knows she is the servant of the tow and naturally expects orders from her employers. She devotes her attention to that alone for which she is hired, viz: the supply of motive power. In many instances, as where she is moored alongside the tow, it is almost impossible that she could perform these duties. And when, as in the case now in hand,

two tugs are employed, on which of the two servants does the responsibility devolve? And yet there must surely be but one rule in all cases allotting the relative duties of tug and tow. I lay aside the cases of emergency, salvage, etc., or manifest incompetency in the directing power on board the tow or obvious danger. In imminent danger the conditions of master and servant may be properly reversed. But in the normal state of things the servant must wait for orders and obey them.

The captain of a ship cannot divest himself of responsibility by devolving his authority upon another, or by adopting the suggestions of another person. So long as he continues captain at all he is responsible for performing the duties of a captain and for the act and neglects (not being violations of duty) of those whom he chooses to employ. It 10 required an act of parliament to exonerate him from this responsibility even in compulsory pilotage waters and then only when he can show that the damage has occurred through the fault of the pilot (not selected by himself but imposed by the Legislature) and without any fault or neglect of his own. He remains responsible whether there is a pilot on board or not and whether the pilot is of his own selection or not. It would be strange if without any act of parliament he could shake off his responsibility by refusing to take a pilot at all. All the authorities are unanimous that it is the tow who has to direct the course. Even in cases cited for the plaintiffs where the unexplained language of the judges would seem to give the tug that power, when the language is read in the light of the decision and the circumstances, it shows the real meaning to be the other way. 20 Thus in *Spaight v. Tedcastle* (6 App. Ca. H. L.) Lord Selborne says (p. 219, Sub fil.) the master of the Ruby was in my judgment entitled to assume that the master of the tug knew what he was about, and would do what was necessary to avoid getting on the bank unless the contrary manifestly appeared, and the plaintiff's counsel relies on those words. But what was the actual point decided in that case? The tow had a pilot; the pilot had directed a certain course, and the tug had disobeyed him and carried the ship on a well-known local shoal. The tug was held responsible. Why? Expressly because it had disobeyed the order of the pilot, "culpa lata"; "and though the pilot had been thereafter guilty of an error of judgment," says Lord Blackburn, "that would not excuse the original and far graver error (in kind, not degree only,) of the tug." Now, why was the error 30 of the tug so grievous in disobeying the order of the tow? It could only be because the tow has the right to command. But the right, or power, involves, necessarily, the responsibility of commanding or acquiescing,—and that means a duty. It would be very strange if the tow should be and remain responsible if they give any express direction as to the course, but that by omitting this duty she should be able to avoid responsibility and acquire the guarantee of the tug and her owners for a proper course being taken. If such a proposition were maintainable, then it would become, not negligence, but the duty of the captain of every tow towards himself and his owners to do as captain of this tow did and go to bed as soon as he got well secured to the tug. The relations of the tow and the tug as employer and employed are, if I may venture to say so, well laid down in 40 "The Energy" [3 L. R. Ad. and E. 34, 56,] and *The Julia* freely cited in the judgment there; and also by Lord Blackburn in *Spaight* and *Tedcastle* p. 220. These doctrines have never been doubted by any judge and any "dicta" which at first sight seem to differ from them will, on examination, be found to support them. They not only flow directly from the doctrine of employer and employed and the authority of the master of a ship over all things connected with the navigation of his ship but I would venture to point out they are based on the reason of the thing as regards tow and tug, both as regards economy and efficiency. The tow employs the tug to take her to the haven whither she would go, therefore the tow should direct the tug. The tow can with much more ease and

accuracy observe, select and direct the course; therefore let her do so and not the tug. The tow would have to pay much more for the services of the tug if the latter were to be compelled to carry additional crew, equipments and a pilot and moreover to undertake an additional guarantee for a duty which after all the tow can perform better at no extra cost at all. Therefore again the course should be left wholly to the tow, nor do I collect that any reason is assigned by the plaintiffs for the contrary rule, exact that the tugs have generally more local knowledge than the captain. But they cannot be assumed to have the local knowledge of a pilot. It would be unlawful for them to have undertaken to act as pilot; and even if the tow in this case had taken a pilot, he, being selected by the captain, would not have been responsible in damages. Then, how can the tugs, for a mere 10 error in pilotage matters, which they did not and dare not undertake, be more deeply responsible than a pilot would have been. Nor is there, I think, any case in which the tug has been held liable to the tow save only where the tug has disobeyed the orders of the tow or carried her upon some well known danger.

It appears in the present case that the captain had on leaving Nanaimo refused the proffered services of a pilot. Under the circumstances with a very deeply laden ship, 23 feet 10 inches, a draft which was of course exceeded at the time of the accident, if there was much fresh water about, and on his first visit to the port, this refusal was very imprudent; but he was at liberty if he chose to undertake the greatly increased responsibility himself. On the evidence, he seems to have alleged two reasons for taking no pilot; one that he 20 would thus save half the pilotage fees, \$3 per foot; the other that he had engaged two tugs. The jury have found, I think quite rightly, that the defendants had not stipulated either that they would or would not tow without a pilot. But it is quite clear that the captain knew the defendants were not providing him with a pilot. His conversation with the Towing Company's agent, Mr. Saunders, on the voyage up and taking a pilot to Nanaimo, and his paying the Nanaimo pilot half his fee, in order to save the other half, everything shows this quite clearly. The tugs entered on their engagement with the ship, I think, knowing that she had no pilot; but their contract was a contract of towage merely, not of pilotage. And, in point of fact, nobody on board of either tug could lawfully have undertaken to pilot the tow, (except, of course, in case of emergency.) This refusal of a pilot, 30 I say, was very imprudent, but it was scarcely "culpa lata," nor did it lead directly to the accident. An hour after passing Entrance Island, a little before nine p. m., scarcely two hours from the wharf, and when if all went well, another hour would have taken his ship into the open gulf, the captain leaves the deck and goes to bed. This was surely terrible neglect, but perhaps even this was hardly "culpa lata;" nor again did this in itself occasion the accident. But there are some other circumstances, I think, which were observed and known on board the tow, and which, I think, did show "culpam latam," in those in charge, "æquiparandam dolo."

The three vessels having pursued a safe and proper course as far as half a mile off Entrance Island, the tugs then laid a course E. or E. $\frac{1}{4}$ N., magnetic. This is found by 40 the jury, and I think is conclusively shewn by this evidence, this is the course advised in the sailing directions in clear, calm weather. The tugs laid that course without any direction from the captain of the tow, but he, possibly seeing that it was the Admiralty course, permitted it, and so, in my opinion, adopted it and he was quite justified in that. But though the tugs laid that course and steered it continuously by compass, they did not make it good. Through some cause or other it is quite clear that they were carried out of that course and taken on to the "Thrasher" rock, which lies at least half a mile probably further, to the south of a line drawn E. magnetic, from Entrance Island, (the Ad-

miralty course.) This deviation from the intended course the tugs did not notice, though if there had been a pilot on deck he could hardly have failed to do so; but the tow did notice it. The second mate of the tow says that he noticed all the way from Entrance Island that they were heading E. by S. by their compass, and that their compass varied one-quarter W. from magnetic. He did not state whether that was additive or subtractive, but, at the least, this showed a deflection of three-quarters of a point from the intended course. The captain of the tow does not himself say that he noticed this, but he can hardly having avoided seeing it, (he was on deck on this course for an hour before he went to bed.) At all events the second mate says that he noticed it all the way from Entrance Island, and they never informed the tugs. I think this was a clear breach of the 10 duty which the tow owed to the tugs. And this deviation from the original course was undoubtedly the sole cause of the accident. For I do not attribute the accident to the change of course by the tugs immediately before the ship struck. As the counsel for plaintiffs insisted, she was then, probably inextricably involved; at least only to be saved by an entire and instantaneous reversal of her course if she had room with her attendants to turn round. But what was the cause of the deviation? This is not quite clear, but there are two circumstances each of which would tend to divert the course of the three ships in that direction, and which together were sufficient, perhaps to account for it. The first was the great flow of fresh water from Fraser River on the port side, setting to the southward. This does not appear to have been noticed on board the tugs, though again 20 it is clear that a competent person on deck of either of them at leisure to look over the side, might and probably would have perceived it. But it was actually perceived by the second mate, for at least an hour before the accident, and again, no notice of this unusual flow was given to the tugs. I think this was another clear breach of the duty which the tow owed to the tugs. There was another circumstance, which would lend to deflect the course in the same direction. The tow was attached by a hawser from her port bow to the starboard quarter of the "Beaver." The "Beaver" was attached to the "Etta White," the leading tug, by a hawser from her starboard bow to the port quarter of the "Etta White." Ordinarily the tow is steered as nearly as may be in the wake of the tug, so as just to clear the bowsprit, &c. But on the present occasion the tow was steered 30 quite unusually wide a point or a point and a half on the starboard quarter of the "Beaver." This would evidently tend to turn the "Beaver" to starboard (i. e.) in the direction of the reef. To correct this tendency I suppose, at any rate it would correct such tendency, the "Etta White" was kept proportionally on the "Beaver's" starboard bow. It appears that the captain of the tow had directed his helmsman not to steer in the wake of the "Beaver;" to neglect her and to steer after the "Etta White." And these orders, which evidently might have an important influence on the course were not communicated to the tugs, who were thus completely misled; and I consider this another instance of breach of duty of the tow to the tug directly leading to the loss. This order to the helmsman of the tow was not only calculated to divert the course, but was in itself a very well 40 recognized signal to the tugs which still further misled them. For it appears clear on the whole, notwithstanding the plaintiff's contention, that the tow does unusually direct the course of the tug in these waters, and when disapproving of the course taken, those on board the tow steer her in the direction which they wish the tug to take. Thus if those on board the tow had wished to revert to the original course, advised in the Admiralty directions, viz: E. magnetic, they had only to turn the ship's head towards the port quarter of the "Beaver" when the tug would have had to go to the northward to keep ahead of her. By keeping so far on the starboard quarter the tow intimated in the clearest way possible for them to adopt that they thought the tugs were giving the reef an unnecessarily wide berth. It is true the tugs appear to have neglected this signal and even tried to counter- 50

act its effect as I have pointed out. They knew there was no pilot on board and probably thought the command wrong. But, at all events, they were thus lulled into security, and I think this another instance of "culpa lata"—an erroneous command to the tugs. There seems to be an admitted error on the chart, both as to the proper extension of the "limits of danger" of the reef (the limits, a dotted line, ought to extend half a mile, at least, to the N. E. of the chart lines,) and as to the situation of the beacon, which is on the chart a quarter mile out of place. The beacon does not appear to have been either sighted or looked for on the present occasion. It appears to me that there is between the recognized "limits of danger" on the chart (on which if a vessel steers it is, so to speak, certain to come to loss) and what I shall call the "limits of caution," as given in the sailing directions, due E. magnetic from Entrance Island (to the North of which if a vessel keeps, it is guaranteed against hidden dangers) there is a belt a mile or a mile and a half wide, which may be called debatable ground. It is stigmatized in the sailing directions as containing a good deal of "broken ground," though certainly the greater part of it is not ascertained to be deep water enough and safe enough, and too near Gabriola Reef for prudence. But there was not on the 14th of July last any commonly known rock there, so the jury have found, and so I am convinced after hearing nearly all the pilots and tug masters of the vicinity. It is true one witness, Capt. Devereux, said that this rock is known to every pilot in this country. He says he stood on this particular rock, which seems to be bare at extreme low tides, about 20 years ago, but really he is the only witness who seems to have ever known of it and he did not report it. The only other witness who spoke of being acquainted with it was Mr. Pamphlet. But when he was asked to show the situation on the chart, he selected a rock within the "limit of danger," some half mile from the rock in question, which is 1200 yards from the beacon. It now appears, from investigation since this accident, that there are several other semi-isolated rocks, though with intervening channels extending to the north-east, so that the dotted "limit of danger" line of Gabriola Reef ought to include at least three-quarters of a mile more than it does on the chart. It was upon this belt of water that the tugs had entered with, as they had every right to believe, the full sanction and approval of the tow, who, by her steering to starboard, was in fact imitating to them that their course was ultra-cautious, when the ship took the ground. I think that the accident was caused by the active agency of the tow, and not by the negligence of the tugs, who were completely misled by the tow, although, no doubt, if the tugs had had a careful watch, they would probably not have been misled and might have prevented the accident. But this indirect conclusion does not make them liable to the tow for the direct results of the tow's much graver negligence, although probably it might be such contributory negligence on their part as would, if they had suffered damage and were now suing the tow, prevent them from recovering. There were many other points argued, but it is not necessary to discuss them, e. g. as to the sub-contract, limit of value, the terms of the contract with the Moodyville saw mill Co., etc. Neither is it necessary to consider the doctrine of contributory negligence, a matter which is only available as a defence; and useful observations are made both by Lord Seblorne and Lord Blackburn in *Spaight vs. Tedcastle* in that respect.

The case of the *Stranger* in the U. S. "Law Times," vol. 24 p. 365, appears to be well decided as to the relative duties of tow and tug, and the learned judge there points out that a tug is held liable to the tow "only where the injury results from the violation or neglect of pure duty coming within the scope of duties devolving upon that class of employment," such as defective tow ropes. But this case, though otherwise useful, and I believe quite rightly decided does not expressly answer the question whether the direction of the course "comes within the scope of duties devolving upon that class of em-

ployment," which is the main question here. There were many other cases cited from the U. S. Courts, some of them apparently at variance with the conclusions there laid down, as to the relative duties of the tow and the tug, and the consequences of any breach of those duties reciprocally. The Lady Pike (21 Wallace, Sup. Ct. U. S. 1); the Margaret (4. Otto. p. 494); the steamer Webb (14 Wall. 406); steam tug Favorite (4 Sawyer 226); Arturo (16 Fed. Rep. 308), in which last case there were, as now, two tugs belonging to different owners employed in one towage service and both were held liable. But then as a matter of fact both tugs were found guilty of the negligence which caused the loss. And it is the principal "causa causans," which is looked to; not a negligence which merely conduces to the loss. Judgment for defendants; the usual consequences.

The time for appealing from such judgment of the Chief Justice to the Supreme Court of British Columbia and of taking such steps by the Appellants as they might be advised in review of the same, was duly extended by several Judges' orders, and afterwards, pursuant to notice duly given according to the rules and practice of the Supreme Court of British Columbia, the Appellants moved that the motion for judgment might be re-heard before the full Court, the judgment for the Defendants set aside and in lieu thereof judgment might be entered for the Appellants for \$75,000, or in the alternative, that the findings of the jury might be set aside as inconclusive and a new trial granted on the grounds of mis-direction and non-direction.

On the 19th April, 1882, the following judgment was upon such motion pronounced 10 by the Court.

[NAMES OF PARTIES.]

Wednesday, the 19th day of April, 1882.

The plaintiffs having duly appealed to the full court, being the last court of final resort in the province, from the judgment of the Chief Justice, rendered herein on the 11th day of July, 1881, in favor of the defendants; and having duly moved for a rehearing of the motion for judgment and to enter a verdict for the plaintiffs, for the sum of seventy-five thousand dollars, or in the alternative, to set aside the findings and for a new trial on the ground of alleged misdirection and non-direction. Upon reading the several orders dated respectively the 4th July, 1881; 11th July, 1881; 29th July, 1881; 24th November, 1881; 11th January, 1882, and the 25th January, 1882, duly extending the time for hearing of the said appeal and motions until the day when same were heard; upon reading the notice of the said appeal and motion, upon reading the pleadings, reviewing the proceedings, and fully considering the evidence given upon the trial, as reported in shorthand; upon rehearing the motion for judgment, and upon hearing Mr. Theodore Davie as of counsel for the plaintiffs, and Mr. Drake as of counsel for the defendants, the Moodyville Saw Mill Company, Limited, and Mr. Pooley as of counsel for the defendants, the British Columbia Towing and Transportation Company, Limited. This court doth dismiss the plaintiff's appeal against the said judgement in favor of the defendants, and the motion to enter a verdict for the plaintiffs and the alternative motion to set aside the findings, and for a new trial, and this court doth affirm the said judgment of the Chief Justice dated the 11th July, 1881, and the same is hereby affirmed accordingly. Let the plaintiff's demurrer to the defendant's pleadings be over-ruled and let the plaintiffs pay the defendant's cost of, and occasioned by this appeal and motion to be taxed by the proper officer, as between party and party. 20 30

By the Court,

GRAY, J., Dissentiente.

JAMES C. PREVOST,

Registrar Supreme Court, B. C.

And the following are the respective reasons for such judgment:

GRAY, J.—In this case I regret that for the reasons I shall hereafter give I cannot agree with the learned Chief Justice either as to the law which he laid down as governing it, or as to the conclusions he has drawn from the facts found by the jury and those which he himself assumed to find under authority of the New Rules of Practice and Procedure. At first I entertained some doubts whether the Rule 298 sufficiently applied to enable him to pronounce judgment, but on further consideration I think it does, and that inasmuch as the court now "has before it all the materials necessary for finally determining the question in dispute and for awarding the relief sought," it would be better to pronounce judgment than to send the cause down again for a new trial, entailing as it would, enormous expense and perhaps a failure of justice from the difficulty of again collecting the witnesses and the evidence, more particularly so, as the defendant's counsel raised no objections to the Chief Justice's rulings or conclusions on the trial tho' the plaintiff's counsel did. 10

The material question on which the dispute turns was not put to the jury, though all the evidence was before them. Assuming the facts concurred in by the counsel on both sides and taking the questions put to the jury with their several answers thereto, the case so far as their findings go, remains incomplete. Those questions and answers contain ingredients to be taken into consideration in forming a conclusion, but they state no conclusion on the main question. In reality the jury empanelled to try the cause were sworn, heard the evidence and were discharged without any verdict on the point at issue. They were 20 relieved from doing that which they ought to have done, saying which of the parties was guilty of negligence. The Chief Justice who tried the cause admits throughout his whole judgment that there was negligence somewhere. It was not a case of inevitable accident. It was not a case of contributory negligence. It was a case pure and simple; one party or the other neglected his duty; which one neglected his duty the jury were sworn to say and they have not said it.

Before referring to the law on the question of negligence in such a case, it is important to examine the ground on which the Chief Justice claims that he may supplement the finding of the jury and by drawing his own conclusions from the evidence assume as a fact proved that which the jury have not found, and thus render complete that which the 30 jury left incomplete. It is to be borne in mind that on this trial the jury gave no verdict. When a distinct verdict is given the law presumes much in its favor and the court will support it unless or until it be manifestly shewn that it was erroneous, but when no verdict has been given such presumptions do not exist. The reason is obvious. The jury are supposed to be intelligent men, practically acquainted with subjects of the nature of the enquiry before them, and to bring to the consideration of such subjects practical business intelligence and experience. The judge's duty is to guide them as to the law. The jury's duty under that guidance to find the fact. The new rules, however, seem intended to provide for an omission of the kind that took place on this occasion, when the court having all the materials before it, can supplement the finding of the jury on points 40 essential to the case (on which points the jury have expressed no opinion) by conclusions not inconsistent with their findings on points on which they have expressed opinion. In no case, however, it seems to me should the conclusions of the court on facts not pronounced upon by the jury, be inconsistent with the conclusions of the jury on the facts on which they have pronounced. Such inconsistency would be a conflict of finding as to acts and form ground for a new trial, whereas when consistent they afford ground for judgment.

The relative duties of the tow and tug are clearly defined in a case as late as March, 1881, *Spaight vs. Tedcastle* 6 App. Ca. H. of L. 217, in which Lords Selborne, Blackburn and Watson approvingly quote the judgment delivered by Lord Kingsdown in the case of the *Julia* (1 Luch 231) as clearly and accurately stating the law. "When such a contract (i. e. of towage) is made, the law would imply an engagement that each vessel would perform its duty in completing it, that proper skill and diligence would be used on board of each, and that neither vessel by neglect or misconduct would create unnecessary risk to the other or increase any risk which would be incidental to the service undertaken. If in the course of the performance of the contract any inevitable accident happened to the one without any default on the part of the other, no cause of action would 10 arise. Such an accident would be one of the necessary risks of the engagement to which each party was subject and creates no liability on the part of the other. If on the other hand the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it—if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident."

This is at the present day the recognized rule of the British Courts. Dozens of cases may be cited in which the findings and conclusions on the facts may be in one way or the other, but the rule is the same in all instances, and those findings and conclusions are simply illustrations of its application; that rule as incident to the undertaking is the "exercise of proper skill and diligence" on board both vessels, and the absence "of misconduct or unskilfulness" on the part of either by which unnecessary risk or any increase of the risk incidental to the undertaking is incurred. In his law the learned Chief Justice essentially narrows this rule. He says: "The contract of towage is merely a contract to supply motive power. It is not a contract of pilotage at all. Neither can it now be argued that the tug impliedly contracts to tow safely. That would be a contract of pilotage of the highest degree. The only implied contract on the part of the tug in that relation is, that it will not exert its power in a way of danger manifest to any person possessing a common seaman's local knowledge (not a pilot's local knowledge) will not run on a well known rock or on the wrong side of a visible known beacon. Having to provide power she is bound to find sufficient coal or steam, hawsers of proper strength and fittings 30 and competent engineers and crew sufficient to work the tug herself, with a steersman to follow the course approved by the tow, and to look out for known dangers, and she is bound to obey all reasonable orders from the tow. I do not know that she contracts for anything else."

Now it will be perceived that this definition leaves out the most essential element pointed out by Lords Kingsdown, Selborne, Blackburn and Watson, namely, the exercise of proper "skill and diligence" to carry out the contract. "Skill and diligence" are the application of mind and thought, precaution and experience. It is perfectly consistent with this definition of the Chief Justice that a tug should fasten herself to the tow, set her machinery to work, and then float off wherever winds or wave or tide might carry, 40 though such conduct would absolutely mar the engagement into which she had entered.

What was the "engagement" what the "service undertaken" here? It was in distinct words, and for a specific consideration "to tow from Nanaimo to Race Rocks or Cape Flattery." And Lord Blackburn says you are to apply to that "undertaking" skill and diligence. Not simply the motive power but the using of the motive power to attain the end contracted for. To say that "the only implied contract on the part of the tug

is that it will not exert its power in a way of danger manifest to any person possessing a common seaman's local knowledge," will "not run on a well known rock or on the wrong side of a visible known beacon," is simply to contract that the motive power is not under the control of a fool, a madman or a knave, but by no means fills the rule taken from the *Julia*'s case that "proper skill and diligence" will be used to accomplish the undertaking. The true rule is not only that you are not to do a foolish thing but that you are to do a sensible thing; you are for the pay you get to make use of your intelligence, your knowledge, your experience, as well as your motive power to accomplish the undertaking. Nor is it an essential of the contract that the tow is always to give the course. It has the power to give the course, but when it does not 10 give it, it is the duty of the tug to take that course which will with the exercise of "proper skill and diligence" and without "misconduct or unskilfulness" on its part reach the destination indicated by the contract. If the tow thwarts that course or by its own "misconduct or unskilfulness" prevents the contract being carried out, then the tug will be exonerated from blame. These two points are clearly laid down and exemplified in the cases of the "Robert Dixon" L. R. 5, Probate Division 54 (A. D. 1879), and of *Smith vs. The St. Lawrence Tow Boat Co.*, 5 P. C. 308, and will have to be enlarged upon hereafter. But apart from these two leading cases the relative duties of the tow and the tug toward each other and the incidents attached to the contract of towage are laid down with such simplicity and such marked contrast to the judgment of the 20 learned Chief Justice in *MacLachlan* on merchant shipping, (ed. 1880, page 286,) that it would be unexcusable not to quote that author.

"The employment of a steam vessel by the master or owners of another ship for the purposes of towage is a contract which implies the exercise of diligence, care and reasonable skill in the fulfilment of their engagement by the parties to it on both sides and their agents and servants, the master and crew of the tug and the master and crew of the ship in tow."

"The parties to the contract contemplate risks in the performance of it, the risk of winds and waves and of obstacles floating or fixed that lie about or in their path. They both engage to be ready armed with diligence, vigilance and competent skill against these 30 risks, and besides this on the part of the tug with such a crew, tackle and equipments as are reasonably to be expected in a vessel of her class. With all this performed, if there be notwithstanding inevitable accident and consequent damage to one of the parties, there is no liability in the other. But neither may by his fault or negligence aggravate the risk of the other with injury to him, without liability for the damage accrued unless the other have contributed to the loss by his own fault or negligence. In all this it is assumed on both sides when the contract is made, that the risk will be no more than ordinary under ordinary bad weather. But there is no implied warranty on the part of the tug to bring the tow to the point of destination under all circumstances and at all hazards. She engages to use her best endeavors for that purpose, but she is relieved from her obligation if she be prevented by "vis major" or by accidents not contemplated which render 40 performance of her contract impossible."

"She is not, however, relieved from her obligation because unforeseen difficulties occur in the completion of her task, because the performance of her task is interrupted or cannot be completed in the mode in which it was originally intended, as by breaking of the ship's hawser, &c. But if in the discharge of her task by reason of the sudden violence of winds or waves or other accidents beyond the control of and with-

out default in the tug the tow is placed in danger, and the tug incurs risk and performs duties which were not within the scope of her original engagement she is entitled, on proof of this, if the ship be saved, to claim as a salvor instead of being restricted to the sum stipulated for mere towage. Such a remuneration under the circumstances becomes her right, but in such circumstances it is not optional with her whether she will render the service. She is bound to do so. This is implied in her original contract from which she is not relieved except by circumstances of difficulty that render the performance of it impossible."

This is the law as laid down by this able author as gathered from all the cases down to 1880, and it will be at once seen how far a contract for towage on the part of the tug goes beyond the mere supply of the motive power. In applying this law to the present case it will be our duty to note how far the performance of the contract on the part of the tug was rendered impossible by any circumstance within the above definition.

Then here: 1st. What was the contract and whose was the "wrongful act" that brought about the disaster?

2nd. Did the sufferer by his "misconduct or unskilfulness" contribute to the disaster? Under English law these are the two questions in the case.

The plaintiffs are strangers, ship-owners at Bath, Maine, U. S. The defendants are towing companies carrying on business for hire in the navigable waters of British Columbia. The plaintiff's ship the "Thrasher" comes to this province and being in want of a tug boat contracts with the agent of the defendants "The British Columbia Towing and Transportation Company" for the services of a tug boat to tow the "Thrasher" to Nanaimo and as soon as she was there loaded to tow her to Cape Flattery for the consideration of \$600.

In this contract the point of departure and the point of destination are both specified and are within the waters where the defendants carry on their business.

The ship was towed to Nanaimo (the captain of his own accord taking Rogers, a pilot, up), was loaded with coal, informed the agent and called upon him and the captain pursuant to the contract to tow her to Cape Flattery. The agent sends the "Beaver" belonging to the first defendants. She not having sufficient power he supplements that power by sending another towing steamer, the "Etta White." The captain of the "Beaver" had been acting and was then holding a certificate as a licensed pilot in the navigable waters of British Columbia, though at the time and in the contract under consideration he was not acting or receiving remuneration as a pilot but was solely the servant of the defendants, "The Towing and Transportation Company," and the master of the "Etta White" held a pilot's certificate for the district of Nanaimo, though then not acting or receiving remuneration as a pilot but simply and solely as the servant of the said defendants. The night was extremely fine and calm, the course clearly defined, well lighted and well known and sea room abundant. The captain of the "Thrasher" gave no directions as to course or otherwise; the tugs as the defendant's servants took the course without any, it must be assumed as knowing the destination of the ship under the terms of the contract which the defendant's agent sent them up to carry out. The "Thrasher's" hawser was carried from the port side of the "Thrasher" to the starboard side of the "Beaver" and the "Beaver's" from her starboard bow to the port quarter of the "Etta White." These arrangements were made by the steamers not by orders from the ship; they moved from

the wharf at 7 p. m., passed half a mile clear of Entrance Island light in half an hour, took the proper course due magnetic east by one point N., and at half past nine or thereabouts with ten miles of clear sea room on the port side and land distinctly visible the whole way on the starboard, found themselves hugging kelp on the starboard quarter three quarters of a mile from the extreme limits of the course taken by themselves and indicated by the charts and sailing directions as free from danger and stranded the ship on a rock which (whether as an individual rock well known or not) was presumably an extension of the well known Gabriola reef surrounded with the indications of danger known to seamen—kelp indicative of a rocky bottom and unsafe for vessels of the tonnage and draught of water of the "Thrasher." Whose fault was it?

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In Nanaimo District pilotage is compulsory or half forfeit. The captain of the "Thrasher" paid the forfeit, deeming as he says the pilot's services unnecessary as he had two tugs engaged and not wishing to incur unnecessary expense. There was therefore no contract for safe pilotage, "eo nomine." But the fact that the defendants had men who were either then or had been licensed pilots in their employ as masters of their boats, gave to the ship owners and captain who contracted with the defendants the presumption that there were competent persons in charge and was an assurance of the exercise of proper "skill and diligence."

Care and diligence under ordinary circumstances are measured by the nature of the duty assumed, the value of the article entrusted, and the amount of compensation contracted for. A man who in consideration of a sum fixed by himself as sufficient remuneration takes charge of very valuable property though not an insurer against inevitable accident is certainly bound at the least to exercise reasonable care, prudence and precaution for its safety.

In order to arrive at the testing point of this case the first thing is to see what material points are undisputed, or have been found by the jury

First then, the evidence shews that in the negotiations preliminary to the contract the captain of the "Thrasher" informed the defendants through their agent that he was a stranger and had a very valuable ship. That the agent recommended him to take a pilot, and the jury have found that ultimately the contract was closed without any stipulation "that the defendants would tow the ship from Nanaimo to the Straits of Fuca without a pilot" or "that the vessel should take a pilot."

Secondly. "That on leaving Nanaimo no course of any kind was given by the ship, its captain or any of its officers to the tugs or either of them."

Thirdly. That a course due magnetic east from Entrance Island was a proper and safe course to take, the usual and ordinary course for tugs and tows leaving Nanaimo harbor and when followed (as shewn by the sailing directions and charts) a perfectly safe course

Fourthly. That on leaving Nanaimo the tugs after passing Entrance Island took that course without any orders or instructions of any kind from the captain of the tow.

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Fifthly. That that course if followed carries a ship from half a mile to one and a half at any rate, if not two miles beyond the limits of danger and the rock on which the "Thrasher" was stranded.

Sixthly. That between the said limits of danger and the opposite side of the straits at Port Atkinson on which there is a light there are ten miles of clear sea room without an obstruction of any character or description.

Seventhly. That the night was unusually calm and clear.

The jury find also three other points which in the view I take of this case are comparatively unimportant.

1st. "That the Thrasher Rock now so called was not generally known prior to the accident." Whether individually known or not it was clearly within the known limits of danger, and out of the line or course due magnetic east from Entrance Island which the defendants themselves had chosen. The question is, not whether they knew that particular rock or not, but what business had they being in the vicinity where it was. It was at least a mile out of their own selected course. 10

2nd. That there was some current setting in shore which would have been noticed and allowed for by a competent pilot either on board the tow or either of the tugs.

3rd. That the tow was steered after the "Etta White" more than after the "Beaver," keeping her one point to starboard of the "Beaver."

The jury, however, do not find that either of these two last named circumstances, the current or the steering, were of sufficient influence to cause the loss, or even to contribute to it, if the proper course due magnetic east from Entrance Island had been followed. Moreover both the tugs were on this occasion the servants of the defendants, and if therefore it was their duty to lead the course it was their duty to lead it properly, and to indicate to the tow that she was causing a deviation. The case turns upon the question, whose duty was it in this instance to take the course and keep it? It becomes therefore the duty of the court carefully to examine the law applicable to this contract, and if possible to see from the acts of the parties themselves what construction they themselves put upon this contract, and what duties by those acts they thus indicated they assumed. As having a material bearing upon the conclusion at which I have arrived it is to be observed that this is a question of contract. That the parties to that contract were the ship and the British Columbia Towing Company. The other defendants the Moodyville Saw Mill Company were no parties to the contract with the ship but were on this occasion the servants of the other defendants, when therefore in my observations I speak of the defendants I confine myself to the British Columbia Towing Company. Whatever questions may hereafter arise as between themselves to the contract with the ship the Moodyville Company were no party. The present proceeding is not "in rem." 20 30

In the first place the defendants are a towing company carrying on the business of towing loaded and unloaded vessels in these waters.

In the second place the captain of the "Thrasher" is a stranger in these waters and knows nothing of them, which information was communicated to the defendants, and with this knowledge they enter into a contract with him to tow his vessel when loaded from Nanaimo to Race Rocks in the Straits of Fuca for \$500 or to Cape Flattery for \$600 without stipulating or requiring that he should take a pilot for his ship (though that subject had been discussed) or take on himself the responsibility of the course. 40

In the third place, under this contract they send their two servants the "Beaver"

and the "Etta White" to Nanaimo to carry out this contract. They take hold of the vessel and without even asking the captain what course they are to go start off of their own accord, select their own course, and proceed to carry out the contract made by their employers, and which they had received instructions to go up and carry out. Even if there was no clear legal rule on this point common sense would say, surely these defendants know how to carry out their own contract, they know what they are about. It is their own ordinary and customary business they are following. They know that I am a stranger and in consideration of \$600 they have agreed to do this work without requiring me to take a pilot. I am therefore safe in their hands, they are responsible. Besides the law says they must carry out their contract with "proper skill and diligence." If I interfere 10 I may put them all wrong, and thus relieve them of their responsibilities under this contract. That is the common sense rule. What is the Legal Rule?

Lord Justice James in the "Robert Dixon" case, L. R. 5 Probate Div. 54, after alluding to the particular circumstances of that case, which was one of salvage says, "Whether the evidence establishes that the tug acted in violation of any positive directions from the ship during the voyage, it is not necessary for us to give an opinion, because if it be true, that no direction were given to the tug apart from the general directions at the commencement of the towage it comes to this, that the master of the tug was acting (as it was his duty to do) 'on his own discretion to take the ship on a safe course' to the Skerries allowing for possible contingencies and a change of weather." 20

Here in the "Thrasher" case, not only were no directions given by the ship, but the tug was acting, the law will imply under the directions it had received from its own employers to carry out their contract.

Lord Justice Brett in the same case says, "I think it is proved by the plaintiff's witnesses that the captain did direct the general course to be taken by the tugs. I am very much inclined to think that a tug is bound to obey the orders of the captain (i. e. of the tow) and if the captain had insisted on the tug keeping that course the tug would have been bound to obey, certainly the captain could not have complained of the tug obeying. But here on the plaintiff's own shewing (the plaintiff's being the claimants of salvage) the only evidence was, that at the beginning of the towage the tug was directed to tow the 30 ship in a particular course I assume that to have been the right course but on the way the weather became threatening. Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary she had the command of the course," &c., &c. "Therefore unless the master of the tug can 'clear himself by shewing that he acted upon orders from the ship, he cannot excuse himself from the charge of negligence, and the burden lies on him to do so.'"

In *Smith vs. The St. Lawrence Tow Boat Co.*, 5 Privy Council cases 308, the "Silver Cloud" Sir Barnes Peacock lays down the rule with equal clearness.

"It appears to me clear, he says, that 'when no directions are given by the vessels 40 in tow the rule in the case of tug steamers is, that they shall direct the course.' The tug is the moving power, but it is under the control of the master or pilot on board the ship in tow."

That is the rule. In that case the application of the rule forcibly shews how much the responsibility of the tug is increased in the present instance. There the court con-

sidered that the tow, having the knowledge that the position was dangerous was guilty of contributory negligence in bringing about the disaster and was not therefore entitled to recover. Not it will be observed, that the tug was guilty of no negligence but that the tow was guilty of contributory negligence. The very use of that term in law shews that the tug was guilty of negligence, of the primary negligence, otherwise the other could not be contributory. In this case of the "Thrasher" not only had the tow no local knowledge, but the fact of that want of knowledge was communicated to the defendants, they on the contrary from the business they were carrying on and their experience in these waters had that local knowledge, and they undertook to exercise "proper skill and diligence" in towing that vessel from Nanaimo to Race Rocks or Cape Flattery and they of their own accord took the course to do it. 10

The value of such local knowledge is tersely expressed by one of the witnesses for the plaintiffs, Captain Clements, an experienced seaman and pilot of those waters. He says: "The tug depends upon its local knowledge and does not bother the chart much."

The next question is, did they exercise proper "skill and diligence" under the circumstances in carrying out the contract?

This question entails not only a review of the evidence, but a review of the application of the evidence by the learned Chief Justice in his judgment because under the rule 298, before mentioned, he having from the evidence assumed to draw certain conclusions 20 essential to maintain his judgment, if the conclusions are erroneous the judgment cannot be sustained.

I differ from him, first, that it was the duty of the tow, under the evidence attending the making of this contract, and the subsequent action of the tugs at Nanaimo in carrying out their instructions from their employers (without asking the tow as to the course) in any way to indicate or direct it. It was a responsibility the defendants assumed. The contract specified the point of departure, it specified the point of destination. The road between the two was known to the defendants, it was not known to the plaintiffs. The defendants had traversed it repeatedly. The plaintiffs had never seen it. The defendants tried to relieve themselves of this responsibility by suggesting that a pilot should be 30 employed, but for the consideration named they undertook the towage without any stipulation in the contract that a pilot should be employed. They knew that it was not compulsory on the ship to take a pilot, that the payment of half pilotage dispensed with that. Thus it is manifest, not only that they recognised their responsibility resulting from the stranger's ignorance but that they suggested a mode of evading it, the insisting on which mode, however, rather than lose the bargain, they gave up, I think therefore in view of this contract that the legal position laid down by the Chief Justice namely, "That all the authorities are unanimous that it is the tow who has to direct the course" is not correct. The tow may have the power and the privilege, but it is not necessarily its duty to do so, the exercise of that privilege is not obligatory. It depends entirely upon circumstances, and may be waved or exercised by arrangements between the parties, or even transferred, as a duty, to the tug, as shewn in the "Robert Dixon" case. I think the omission to recognise this distinction was the first starting point of error in this case. The inference that the tow assumed any responsibility for the course is negatived by the special facts while the assumption of that responsibility by the tugs is conclusively shewn by the same facts. They knew the road so well that for the \$600 they assumed it, and most strikingly is the assumption of that responsibility on the present occasion confirmed, 40

by the fact, that the defendants themselves produced and put in evidence one of the printed forms of contract they ordinarily used, in which it was set forth in express words that "the tug boat and owners are not to be held responsible for the piloting of the said vessel while in tow of the said tug boat." Yet on the present occasion they did not use that form or as the jury have found include in their contract any such stipulation.

Did they then exercise "proper skill and diligence?" On this point we have the evidence of the actors on the scene, of those who were present on that night, who under oath detail exactly what they did and by those details shew us what they omitted to do. The captains, officers and men of the three vessels must necessarily be the best witnesses. There 10 was nothing new, unknown or dangerous in the course. It had been traversed repeatedly by the masters of the tugs, and these men though not acting as pilots held certificates as pilots, thus shewing that they knew and were familiar with that course, and by taking it without instructions from the tow, proclaimed their knowledge and their duty. There was nothing exceptional in the weather except its extreme calmness and its soft summer twilight, (July 14th) or in the current from the Fraser River which was emptying its waters into the Gulf just as it was wont to do since it was first known by navigators, no evidence whatever to show that there was an unusual flow or extraordinary amount, and there was an admitted clear space of sea room ten miles wide free from all obstructions and all dangers in which to take that course. Who was to blame for getting out of it? 20

There were present that night actors on the scene, Captain Smith of the "Etta White," Captain Christensen of the "Beaver," Benjamin Madigan, engineer of the "Beaver," and John Jagers the mate of the "Beaver," Captain Bosworth of the "Thrasher," H. G. Young second mate, and Herman Larsen able seaman of the "Thrasher," seven witnesses sworn and examined, the only persons who detail the circumstances that took place on board the ship and steamers, the occurrences on the course and at the time of the disaster. Of the other 22 witnesses called, sworn and examined, not one was present. It is pleasant to a witness to have a theory, it is more important to the court and jury to have a fact. Captain Smith of the "Etta White" says, (the evidence of these witnesses was given on the trial in June, 1881, eleven months after the disaster) "After leaving 30 Entrance Island laid my course east magnetic, but steered east by south by our compass to make that course good, my compass was out a point, that is the course I always take. That course was changed five or ten minutes before she struck." "I was a pilot for the tug; got a certificate to enable me to run the tug without paying pilotage dues; never had a pilots license to pilot vessels; have often towed vessels in the neighborhood of where she is lying; did not notice any kelp there that night; did not steer through any to my knowledge; been navigating those waters 10 years; I am tolerably conversant with the points of the coast and the land marks in that locality and I find out where I am from land marks and local knowledge; that night you could see the land all the way down; could see Cowichan Gap, but not Knotch Hill; didn't try; took no 40 bearings from the light or any thing else; made no allowance for the current; didn't think of it; noticed the "Thrasher's" deviation before she struck an hour or more; that was the only time I noticed it; can't say that was an improper steering on her part; would not tell the ship even if I saw her improperly steering; I thought from the way the land lay at the time it seemed to me we were rather close in; that was about five minutes before she struck."

Captain Christensen, master of the "Beaver": "Had no conversation with the captain as to the course we were to steer; he told me nothing at all; after passing round

Entrance Island I laid off my course to make good an east course; that is the course I always take, due east magnetic; I was steering myself when I rounded Entrance Island; the mate, Jagers, took charge of the helm when I gave it up; I could not say how much the steering after the "Etta White" would set the vessels off the course; it had some effect; did not know of the current; found it out afterwards; when we started from Nanaimo got no orders from Captain Bosworth but to "cast off;" nothing further was heard from the ship. The duty of the tug is to keep ahead of the ship and to look out to hear if any orders are given by the ship and attend to them; the ship was astern when I came up; the true course after passing Entrance Island was east quarter north; that is when I went off the deck; held pilot's certificate at the time, but was stopped from collecting pilotage fees 10 by the pilot commissioners at Nanaimo; there is nothing to prevent my piloting if I want to; but we don't expect to pilot without getting paid for it; I am competent to do so if I choose I suppose." "It is usual when a ship is sagging to one side or the other to counteract that by movements of the tug. It is the course, of course, to counteract it." When asked whether any effort was made on that occasion to counteract the sagging of the ship says, "he can't say, and even if he had observed the ship sagging towards the shore, he would not do anything to counteract it without orders from the ship, nor would he call the attention of the ship to it."

Question.—"Would you not, knowing it a dangerous thing for the ship to do?" 20

Answer.—"Well it might possibly be then."

Question.—"If you had seen she was likely to cause any danger would you cause something to be done to counteract it?"

Answer.—"If there was any danger to the steamer I had charge of I would most certainly have avoided that danger."

Question.—"Would you not also to the ship?"

Answer.—"I had no charge of the ship, I could not intimate to the ship where to go."

Question.—You would have warned the ship?

Answer.—"I didn't consider it was my place to interfere with the ship." 30

These answers require no comment. In my opinion it would be a good thing for every ship that he is towing that this captain should "turn in" as soon as possible after the towage commences.

In a written deposition put in evidence signed and sworn to by him on the 11th of August, 1880, within a month after the wreck, he states: "He left the wharf about seven o'clock on the evening of the 14th ultimo; Etta White was towing ahead of the Beaver; passed Entrance Island about quarter past eight; set the course down the Gulf E. by S. quarter S. by Beaver's compass, being one point more E. than usual; compass out about one and a half points, I then set the watch and 1st officer on deck; I then turned in giving orders that if anything went wrong to call me; I did not say anything about altering 40 the course; I considered that we were going about five and a half or six knots; considered that at that rate we would be at the Flat Tops in one hour and a half; I do not alter my course until I get well clear of Gabriola Reef; I did not give the mate any instructions to call me at Gabriola; I am a Victoria pilot in good standing; do not remember if I was informed of a pilot being upon the ship; I consider my 1st officer a competent man who has been up and down many times at night; I did not come upon deck until she struck; the ship's crew passed the hawser aft but the captain stopped me, saying that the ship was

filling fast and he was afraid to take her off in deep water; she struck about half past ten; I did not think the rock was as far out as it is; I did not consider it quite safe to tow as close as the 'Thrasher,' but I believe vessels have towed down as close; I consider now it will not be safe to tow down within a mile and a half of the beacon; I am not now a licensed pilot for Nanaimo."

John Jagers, mate of the Beaver.—"Took the wheel at Entrance Island light, Beaver then heading E. by S. quarter S., deviation of compass over a point; that would make magnetic bearing east; stayed at the wheel until after the vessel struck and steered on that course until shortly before she struck; we changed a few minutes before she struck; noticed the tow was a point to starboard; didn't notice any current until after we struck; 10 then noticed it setting in shore. Captain Christensen went below after we cleared the lighthouse, and told me to steer after the Etta White; I didn't know the course very well; we were steering S. E. by E. by our compass; our compass is out considerable; we were steering E. by S. quarter S. by our compass. I did not know enough of the coast to know if we were in too far or not. The course was changed ten minutes before she struck to S. E. by E."

Benjamin Madigan, chief engineer of the Beaver.—"Was on watch when the vessel struck; in regard to the Beaver the Thrasher's position when she struck was very much inside closer in shore; a great deal more so than vessels usually are; some keep straight astern; some a little on one side, and some a little on the other; this was very much on 20 one side; does not know that any one else than himself was on the deck of the Beaver when the ship struck. Jagers was steering in the wheelhouse in the hurricane deck; did not see Captain Christensen on deck; my duty as engineer was to go round where the machinery was, looking that all its working parts were doing their duty; that he (Madigan) was on deck several times after leaving Nanaimo, generally every half hour to look around the machinery; don't remember seeing the captain on deck."

Now these were the four witnesses for the defendants who were present on the occasion. By their evidence we have clearly established,

1st. A thorough local knowledge both on the part of the captain of the Etta White and on the part of the captain of the Beaver, long familiarity with the course—ten years; 30 competency and the possession of the "skill" which would enable them to follow it.

2nd. That there was not the exercise of the proper "skill and diligence" to follow it correctly. The captain of the Beaver "turns in," leaving the charge of the wheel to a man who says "he did not know the course very well or enough of the coast to know if we were in too far or not, and with orders "to steer after the Etta White," and this man was his first officer and no other man is shewn to have been left on deck.

3rd. That while these two servants, the captains of the "Beaver" and the "Etta White" sent up by the defendants to carry out this contract, tell you that "it is the duty of the tug to look out for orders and signals from the tow," they do not station a single 40 man to look out for such signals or receive such orders, nor is it shewn that there was a single man on the decks of either steamer who could have seen or heard them had they been made. One goes to bed the other to his wheel house, and not a deck lookout is shewn to have been left anywhere on either steamer.

4th. That the orders left with the officer in charge when the captain of the Beaver "turned in" were, not to look out for signals from the tow as to the course or directions of any kind, but simply "to steer after the Etta White," thus shewing conclusively that whatever might be the ordinary rule as to looking out for orders and signals from the tow, on that occasion he considered the tugs as masters of the course, and the Etta White good to lead it, this same captain of the Beaver who so "turned in" being the special officer or servant of the defendants sent up to carry out the contract.

5th. That while thus masters of the course they do not take a single "bearing" to see that they are following the course taken by themselves, Magnetic East from their point of departure; do not make the slightest allowance for an ebb tide, or fresh water current 10 from the Fraser River, or for the "sagging effect" of the steering of the tow, which if true, they now say they noticed and allege to have been the cause of the disaster, but steam along on a calm clear night deflecting a mile out of their own selected course until they land on a rock in the midst of an acre of kelp, which kelp they did not see or know they were sailing through, and which rock was in the immediate vicinity, if not a part of the well known Gabriola Reef, from which their local knowledge told them they should keep at least a mile away.

6th. That the captain of the "Etta White," the thus recognised leader of the course, says that he himself noticed the Thrasher's mode of steering an hour or more before the ship struck, and "that he could not say that it was an improper mode of steering," nor 20 would he tell the ship, if he thought so, and "that it seemed to him from the way the land lay that they were rather close in."

7th. There is the distinct admission made by the captain of the "Beaver" in his sworn deposition before Mr. Peck, the Receiver of Wrecks, shortly after the disaster, "That he did not think the rock was as far out as it is, and that he did not consider it safe to tow as close as the 'Thrasher' and he would not now consider it safe to tow down within one and a half miles of the beacon."

As confirmatory of the opinion of the captain of the "Etta White" that the mode of steering of the "Thrasher" was not improper it may be observed that Captain Clements before referred to in his evidence says, "There is no rule as to taking a pilot, the 30 tow in going, goes a little to one side, to keep jib clear, that is the ordinary practice."

Before turning to the plaintiff's evidence touching the occurrences of that night there are two official documents that must be referred to;

1st. The Admiralty notice of this rock, published on examination of the locality after the disaster. "Notice to Mariners, No. 193."

North America, West Coast, Vancouver Island, Straits of Georgia, (1) Gabriola Reef, "Information has been received that the beacon erected by the Canadian Government on Gabriola Reefs, near the eastern end of Gabriola stands on the largest ledge which covers at six feet rise of tide. At the distance of nearly six cables N. 15 E. from this beacon and 40 about two cables length seaward from the end of the Gabriola Reefs, a detached rock which dries one and a half feet at low water, Spring tides, has been found in the kelp which marks the neighborhood."

"There is eleven fathoms within a cable length of the rock on its seaward side, and between it and the Gabriola Reefs there appeared to be a depth of about five fathoms over a rocky bottom."

The other is the Nanaimo Pilotage District Regulations under authority of the Dominion Parliament put in evidence by the defendant's counsel. These point out the necessary qualifications to obtain a certificate and license. "Licenses will be granted to a limited number of such persons as the board shall find to be qualified and eligible. Applications must be in writing to the secretary. Masters or mates of Canadian registered steamers on producing proof of qualification to the satisfaction of the pilotage authority shall be entitled to a yearly certificate as pilot for the vessel in which they may be then employed on payment of an examination fee of \$10 and while a duly pilotage certificated master or mate is actually employed as a master or mate of a steamer registered as aforesaid the said steamer shall not be liable to pay pilotage fees." Qualifications.—Any person applying for a license as pilot for this pilotage district must be a British subject not under 21 years of age, and produce evidence that he has served in some licensed pilot boat for at least three years, or that he has served in square rigged vessels, either in the capacity of master or mate. No application will be entertained for such license from any person whose knowledge of the navigation of the waters in the said pilotage district does not extend over a period of at least two years practical experience. The applicant will be required to prove to the board that he is in all respects competent to fulfil the duties of a branch or licensed pilot, and pay the sum of \$25 examination fee and a license fee of \$50." The extent of this district is thus described: "A pilotage authority having been established at Nanaimo, B. C., with jurisdiction extending to all other parts of Vancouver Island excepting Victoria and Esquimalt harbors, the following By-laws are made by said authority for the government of pilots of Nanaimo Pilotage District, and these By-laws are certified as approved of by the Governor General in Council on the 4th of December, 1879."

These official documents authoritatively establish two things:

1st. That the particular rock on which the "Thrasher" was stranded is in the midst of kelp, dry one and a half feet at low water spring tides, and is in the vicinity of the well known Gabriola Reef.

2nd. The extent of experience, sea service and local knowledge of the navigable waters in the Nanaimo Pilotage District a person must have before he can obtain a pilotage certificate or license from the pilotage authorities at Nanaimo. Captain Smith of the "Etta White" swears that he held such a license or certificate.

It was this "Etta White" with this Captain Smith, that Captain Christensen of the "Beaver" when he left the deck to "turn in" after rounding Entrance Island told his steersman to "steer after," both of them being then engaged in the service of the defendants to carry out their contract with the "Thrasher," and it was this same "Etta White" with this same Captain Smith on this same occasion that the captain of the "Thrasher" told his steersman to follow. It is now said on behalf of the defendants that because the captain of the "Thrasher" gave the same order to his steersman to do exactly that which the defendant's servant, the captain of the "Beaver," ordered his steersman to do, the latter captain having a perfect knowledge of what was right and of the capacity and competency of the captain of the "Etta White" to do, what they were both sent up to do,

namely to carry out the contract with proper "skill and diligence," therefore that the captain of the "Thrasher" was wrong. It will require a great deal of study to make men of common sense understand such reasoning.

The Chief Justice observes in his judgment that these men were not acting and dared not act as pilots on the occasion. Admit it. No effort is sought to charge them as pilots, but the knowledge they possessed they could not divest themselves of, or act contrary to. That knowledge by the terms of their employment, was at the service of the defendants. By virtue of the possession of that knowledge they held pilot's certificates and were consequently exempt from paying pilotage dues when they entered the harbor of Nanaimo, an advantage which inures to the benefit of the defendants when they send these captains 10 on such duty, and which knowledge for the purposes of such employment becomes the property of the defendants and they by the contract undertake to use it "with proper skill and diligence." This action is not against these men for breach of duty as pilots or for assuming to act as pilots, but against the defendants for not carrying out their contract, and the fact of these men, their servants, being pilots and the consequent knowledge they possessed is simply proved, to shew that the defendants had the knowledge and the means and the competency of carrying out their contract but neglected to use that knowledge or those means.

We will now proceed to consider the evidence of the three witnesses for the plaintiffs who were present on that night and were examined and gave their evidence. Two it will 20 be observed, Larsen and Captain Bosworth, under commission in October, 1880, at Victoria just three months after the disaster, and Young on the trial in June, 1881.

Larsen states "he was an able seaman of the Thrasher; that he went to the wheel at eight o'clock and continued at the wheel until she struck, about an hour and a half afterward; that a lookout was placed forward; that no particular course was given him to steer, but he was directed to steer after the Etta White, because the Beaver was an old boat and did not steer very well; that the captain had been on deck from the time they left Nanaimo until about ten minutes or a quarter of an hour before she struck; that he followed his instructions; and when the ship struck the Etta White was right ahead the Beaver on the port side of the Etta White and a 30 point on the port side of the ship; that he had noticed a change in the course of the Etta White just before the Thrasher struck; on re-examination he fixes this change in the course of the Etta White at three quarters of an hour before the ship struck; that when the ship struck the captain went forward to the top gallant forecastle and hailed the steamer 'where he was taking us to,' but he, the witness was so far back he did not hear the answer."

Young was second mate of the Thrasher and gives the reasons for the Thrasher's steering: "You are supposed to keep the tug half a point or a point on the bow that the hawser is on; we had the hawser on port bow, and I was supposed to keep the tug open out by the mast where the man at the wheel could see it; that was done; she was steering 40 that way until she struck, in a line with the tugs half a point or a point, that is to keep the hawser clear of the head gear, still in a line, except a sufficient distance so that the man at the wheel could see the lights, the mast head lights, (that is of the tug); the Thrasher was a nice steering ship, steered like a pilot boat. He says he had been there before; that the night was clear, and he could see the outlines of the beach and trees distinctly; that he thought they were too far in, more than he had ever been before, half

an hour before they struck but that he didn't know there was any danger. If he had he would have cut the hawser and let the ship gone off; he supposed they (that is the tugs) were "qualified men." He had no authority to direct them, or to do anything; that hailing the Beaver she said it was Gabriola Reef; she is all right; the Beaver he said must have passed over the crevices; the kelp was extending all around."

Captain Bosworth on his examination says, "I went to Mr. Saunders, the agent of the tug boats in Victoria, and made a verbal agreement. The agreement was to tow the ship to Nanaimo and after she was loaded thence to Cape Flattery for \$600. Mr. Saunders gave me the tug Beaver to tow up; he said in all probability the Alexander would be available when I was ready to be towed to sea; on going up I engaged a pilot; I asked Mr. Saunders 10 if it was necessary to take a pilot; he said as a general thing it was not customary to take one; he said Captain Warren of the Beaver was a man they put great confidence in; he said he thought as I was a stranger, and it was possible I might break adrift, that it was advisable for me to take a pilot; when ready for sea he wrote Mr. Saunders for the Alexander; he, Mr. Saunders, replied she was not available but that he would send the two boats, Pilot and Beaver; on the 13th of July instead of Pilot and Beaver, the Etta White came up; Captain Smith said he was sent to tow me down; refused to go with him; Beaver came up and coaled; Captain Smith told me he had received telegram from Saunders that Beaver had gone up to take ship in tow with the Etta White; after the Beaver had taken my hawser the Etta White passed her hawser to the Beaver; that the ship was well found, 20 proper watch set and orders given to steer after the tugs; that he did not think it necessary to take a pilot, as he was to have the services of two tug boats, and other vessels did not take pilots; that he had made enquiries as to the captains of the tugs and they were represented to him as efficient men; that he gave no instructions to the tugs; no directions to either to proceed, they settled that among themselves; there were 90 fathoms of hawser between the Beaver and the ship; does not know the length between the Beaver and the Etta White; that he went below ten or twenty minutes before the ship struck; describes the shock; states that coming on deck he rushed forward, hailed the Beaver, asked the captain "where he had got the ship"? He replied "she was on Gabriola." I asked him how he got her there? He said "he or they had hauled too quick." I asked him what 30 he thought of doing? He suggested getting out a hawser, which was immediately done. Witness then details the ineffectual efforts to get the ship off, and on re-examination says at the time of the disaster the ship was lying in a bed of kelp for nearly 100 yards outside and nearly twice as far inside."

These are the three witnesses on the part of the plaintiffs who were present that night and detail the occurrences.

By their evidence we have it clearly established: 1st. That no directions were given from the tow as to the course, or any interference with it afterwards when taken by the tugs.

2nd. That the mode of towing, placing of the tugs, fastenings of the hawsers, and 40 relative position of each was the work of the tugs themselves, and that the steering of the tow one point off was from the very commencement of the towage and was continued until the disaster.

3rd. As bearing upon the question of responsibility for the course, the reason assigned by Mr. Saunders for recommending Captain Bosworth of the Thrasher to take a pilot, was not to direct the course, but "as he was a stranger in case of his breaking

adrift," and that "as a general thing it was not customary to take one." An observation confirmed by the evidence of several of the captains sailing in these waters called as witnesses.

4th. That neither the captain of the Thrasher, his steersman or 2nd mate or so far as the evidence goes, any person on board his ship had any knowledge that they were in danger, nor was there any act of commission on their part, by which the disaster was accelerated or brought about; the steering of the Thrasher one point off having been explained, noticed by the tugs and not objected to, and in the opinion of the captain of the Etta White "not improper."

5th. That the captain of the tow had from previous enquiry learnt that the men in 10 charge of the tugs were efficient men, from local knowledge competent to carry out their contract, whilst he had no local knowledge or his subordinate officer, sufficient to know of any danger.

6th. That at the time of the disaster the cause of it was promptly and immediately assigned by the captain of the Beaver, not that the tugs were not responsible for the course, not that they did not know it, nor the current from the Fraser River, nor the sagging in shore by the mode of steering of the tow, not that it was the fault of the tow in any way, but that "he or they had hauled too quick." What was the meaning of that prompt reply. A sailor's answer to a sailor's question, "They had hauled too quick." It is plain by his own admission they had changed their course and headed down the Gulf before 20 they had passed the point of danger which they knew lay in their course, and this answer was given before the extent of the disaster was known, for it was immediately followed by instructions to get out a hawser to haul the vessel off. The other reasons now assumed it would almost seem are after thoughts. I may be all wrong but I cannot disguise my conviction that this disaster arose from an over weening confidence of the tugs in their personal local knowledge and a desire without reflection to shave the matter too close. They had not the slightest intention of doing what was wrong. This conclusion requires no refinement of reasoning, no elaborate distinctions of law, no wonderful exercise of intelligence. The tugs had been over the ground so often that they took it as a matter of course they would go right. One captain "turned in" and the other sat in his wheel 30 house and hauled too quickly without thinking of the tow behind them. The tugs naturally wanted to cover as little ground as they safely could in doing the work assigned to them, and from an over weening confidence in themselves created by having gone over the course so often without accident, they were not as watchful on the occasion as they should have been. All sound law is based on common sense and human nature, and to my mind it is impossible to read the evidence in this cause and come to any other conclusion than that the disaster arose from carelessness and neglect on the part of those who undertook to select the course and to keep it. The captain of the tow might have been all wrong to put so much confidence in these tugs, but he did what probably ninety-nine men out of one hundred would have done, and whatever he may have omitted to do 40 he certainly did not do anything that led to the disaster. His error if any, was negative, not active.

It is on the legal construction of the contract and the testimony of these seven witnesses that I think the case must mainly turn. Charts, sailing directions, pilots, captains, witnesses after witnesses all come forward, and prove conclusively that if the course due magnetic east had been followed the disaster would not have occurred, whether that particular rock was known or not. Known, the course being a mile clear of it, and all equally

say that while occasionally a vessel may possibly have passed closer to the place of the disaster than is recommended by the charts and sailing directions, and have escaped, yet it is not prudent to do so, and most certainly not at night.

It requires no nautical knowledge to tell a man that a vessel moving across a current will be impelled more or less in a diagonal direction, and that the tendency will be increased by the greater the immersion of the moving body; the question is, whose business was it on this occasion to notice and counteract that tendency? Who undertook to do it? Who was paid for doing it? Who had the local knowledge that the current was to be expected there? The man who was a stranger, never there before or the men who were carrying on business in those waters at the price named by themselves? Surely it 10 does not admit of a question. To say that the tug simply supplies the "motive power" is to my mind a mistake. The motive power requires a head to direct and a hand to put it in motion, and Lords Selborne, Blackburn and Watson say that that head and hand must work with "proper skill and diligence" to carry out the undertaking in which they have embarked. A shipowner does not contract with the owner of the "motive power" to run him on shore, but to tow his vessel with prudence according to the best exercise of his experience and local knowledge as a tug owner.

It will be noticed throughout this case that no charge of commission is made against the ship, but simply of omission. Now if the "motive power" had followed the course it took of its own option, the omission charged against the ship would not have been of 20 the slightest effect even supposing, of which there really is no evidence, that there was an unusual current on that occasion. In connection with this observation it may be here stated, that in the Admiralty sailing instructions which are prepared with great care and in which the courses, distances, reefs and bearings are laid down and the Gabriola Reefs, there called "a dangerous cluster of rocks, some of which cover at half flood, others having a few feet of water over them and cover a space of half a mile" (page 112) and (at page 70 "as an extensive group of rocks uncovering at low water at one and a half a miles eastward of the Flat Top Islands; much broken ground exists in their neighborhood and it is desirable to give them a good berth," there is not the slightest intimation of any current from the Fraser River to be guarded against. Indeed the Fraser River empties 30 into the Straits of Georgia by exact measurement on the Admiralty chart five and two-thirds nautical miles below the Gabriola Reefs and the rock on which the Thrasher was stranded. There is not the slightest evidence of any exceptional flow from the river or of any commotion, heavy rains or other cause whatever to create it, nor of its having been noticed anywhere else throughout the neighborhood at that period. I think it may well be doubted whether the flow upon the rocks at the time of the disaster was any more than the ordinary ebb of the tide which was then running. The jury in answer to one of the questions find that there was "some current" setting in shore, but whether strong or weak, where from or from what cause is not stated. Nor was it found by the jury that it in any way caused or contributed to the disaster, or that it was of sufficient 40 influence to have caused any deviation from the course the tugs took, had they used even the most ordinary precaution to keep to that course, and while in answer to another question put they find that Captain Bosworth did instruct his steersman not to follow the course of the Beaver, but that of the Etta White, and to another that he did follow a reasonably direct course after the Etta White and not after the Beaver, they do not find that either the order so given or the carrying it out contributed in the slightest degree to the disaster or caused in any way the deviation now complained of. Equally may the same remark apply to another answer given to another question, namely, "We are of opinion

that Captain Bosworth as captain of a tow did not take proper precautions as to noticing rate of speed and real direction of his vessel progresses." Laying aside that such an answer as to "proper precautions as a tow" is more the expression of a legal opinion than the finding of a fact to which the court should apply the law, it will be noticed that they do not find "that the rate of speed or the real direction of the ship's progress" had anything whatever to do with the subsequent loss and as "to the real direction of the ship's progress," that they had found in the answer just preceding that she "did follow a reasonably direct course after the Etta White and not after the Beaver," and they did not find that that had anything to do with the deviation. It is to this supposed current and the mode of steering of the Thrasher one point off and the alleged deviation caused thereby that the learned 10 Chief Justice mainly attributes the disaster, and he seems to have considered that it was entirely the duty of the tow to have noticed and guarded against the consequences. I differ entirely with him. Those two causes if in reality any such existed were not sufficient according to the evidence to have produced even an approximate effect, if the tugs had kept on the their own selected course, and taken proper back bearings to have seen that they were keeping it. It cannot legally be assumed that the whole duty of course, bearings, observations, directions, watchfulness, skill and diligence even to correcting the tugs mistake, was to be on the part of the tow, and that the tugs were to do little more than oil their machinery and not blow themselves up by letting their boilers run dry. The Chief Justice is extremely severe on the captain of the tow for absenting himself 20 from his deck for half an hour or twenty minutes before the disaster, or as the jury find he left the deck about a quarter to nine o'clock, and yet has not one word of condemnation of the captain of the Beaver "turning in" immediately after leaving Entrance Island and never shewing himself again until after the disaster. The captain of the tow is blamed for not noticing the deviation from the course after leaving Entrance Island, and it is assumed (though not proved) he must have noticed it "because he was on deck on this course for an hour before he went to bed," and the second mate states he nad noticed it, but there is no blame attached to either the captain of the Beaver or the captain of the Etta White for not noticing it, though having selected the course without instructions from the tow surely it was their duty to justify that selection and keep that course. A 30 captain of a ship cannot shake off his responsibility and he therefore, it is said, should have been on deck, looking out. The same responsibility attaches to the captains of the tugs and they should have been on deck looking out, but the evidence shews that the captain of the Beaver had "turned in" and had not been on deck at all from the time of leaving Entrance Island, and some ten minutes before the di-aster up to which time he had been steering, the captain of the Etta White had gone into his room to look as he says at his charts, having conceived from his observations of the land that they were too close in, neither of them having looked out himself or set any one to look out. Nor is it shewn that this temporary absence of the captain of the Thrasher from his deck or his non-noticing of the current, had the slightest bearing upon causing the disaster, for 40 whether right or wrong the evidence shews he placed himself as to the course entirely in the hands of the tug, for he knew nothing about it and believed that under the contract he had nothing to do with it.

There have been some forty-three authorities cited in the argument and over five hundred pages of manuscript copy of evidence read, taken down by a short hand writer. It cannot be expected that each one of these authorities should now be reviewed or the whole details of this evidence entered into. From a consideration of those authorities and that evidence on the whole I have come to the conclusion above stated.

I think this case must be governed by the contract and that the acts of the defendants and their servants sent up to carry out that contract indicate most clearly what that contract was and that as incident to that contract the law imposed upon them the responsibility of carrying it out with "proper skill and diligence," and not only did they not carry it out "with proper skill and diligence," but that they were guilty of gross negligence, and that the disaster, I cannot call it an accident, was entirely attributable to that negligence, and not to any "wrongful act," "unskillfulness" or "misconduct" of the captain of the Thrasher, his officers or ship.

I have been thus minute in my observations, because differing from the learned Chief Justice, both as to the conclusions he has drawn from the evidence, and the law he 10 has applied to the case, it is but right that my observations should be submitted to a similar scrutiny.

I think the judgment should be for the defendants, the Moodyville Saw Mill company, because they were not parties to the contract, but without costs, as the captain of the Etta White, their servant, was as culpable as the captain of the Beaver and moreover the steamer herself was not at the time engaged in the business for which her owners were incorporated, vide act of incorporation, cap. 3, 1878, sect. 2, and as against the other defendants the British Columbia Towing Company the judgment should be for the plaintiffs for the full value of the ship and cargo as proved, with costs.

The value of the ship I find to be at the time of the disaster, according to Captain 20 Bosworth's evidence, which on that point is uncontradicted, \$80,000; she is shewn by the certificate of registry to have been 1512 tons burthen and cost \$55 per ton, at which rate he bought in a short time before, a comparatively new ship, having been built in 1876, stranded in July 1880, and to this value the plaintiffs are entitled, the limitation in the Canadian shipping act to \$38.92 per ton of the tugs not applying. No statement of the value of the cargo is given but it is shewn that the proceeds of sale of ship and cargo after stripping off the gear was \$520. That the gear brought \$3400; total proceeds \$3920 less \$1400 expenses in efforts to save, 1512 tons at \$55 equals \$83,160; deduct \$2520 net proceeds of sales after expenses, (\$83,160 less \$2520), \$80,640, but Captain Bosworth having estimated her at \$80,000 must be limited to that sum. I think judgment should be for 30 the plaintiffs against the defendants, the British Columbia Towing and Transportation Company for \$80,000 with costs: for the Moodyville Saw Mill Company as against the plaintiffs but without costs.

CREASE, J.—I have examined and reflected much on all the evidence, oral and documentary, authorities and arguments which have been brought forward in this case.

The motion before this, the Full Court, is in a three fold form: 1. To set aside the judgment given for the defendants. 2. To grant a new trial. 3. To reverse the judgment and enter it for the plaintiffs. The grounds were:

1. That according to the facts admitted on the pleadings, supplemented by the findings of the jury, plaintiffs were entitled to a verdict to recover.
2. That if plaintiff's right to recover be conceded, the limitation of the liability by statute does not arise, that there is no statutory limitation to the liability.
3. That if the findings are not held to entitle the plaintiffs to a verdict there are not sufficient facts found to absolve the defendants, then there must be a new trial on the ground of: 1. Misdirection. 2. Non-direction.

Because the material issues of fact on which the judgment is based were arrived at by the judge and should have been left to the jury. That the judge found matters of fact which plaintiff's counsel alleged it was the exclusive province of the jury to have found. The motion was fully argued before the full court by the counsel on both sides. The judgment of the Chief Justice, the questions submitted to the jury and their replies, the authorities and documents cited at the trial and evidence taken in short hand at the trial were all read and fully commented on during an argument which lasted eight days.

The court took time to consider after long and careful consideration; the court now 20 delivers judgment.

To understand the findings of the jury it is necessary to give the questions to which they were replies. These were as follows:

BY THE JURY.

Question.—Did the defendants or either and which of them at any time contract to tow the "Thrasher" from Nanaimo to Fuca Straits without a pilot engaged as such by the "Thrasher"?

Answer.—There was no contract made by either of the defendants to tow the Thrasher from Nanaimo to the Straits of Fuca without a pilot, neither was there any direct stipulation in the contract which was made between Captain Bosworth and (the agent) Mr. 30 Saunders of the British Columbia Towing and Transportation Company that the vessel should take a pilot.

Q.—What was the magnetic compass course taken by the tugs from Entrance Island?

A.—The magnetic compass course taken by the tugs was about due east from Entrance Island which course was changed by the "Etta White" some ten minutes before the "Thrasher" struck.

Q.—Was any specific compass course (or any other course) given by the tow to the tugs either by the captain or other officer?

A.—No course of any kind was given by the tow to either of the tugs by Captain Bosworth or any of his officers.

Q.—At what time did the captain of the "Thrasher" go to bed?

A.—We are of opinion that Captain Bosworth left the deck about a quarter to nine o'clock.

Q.—Did the captain of the “Thrasher” direct his steersman to neglect the “Beaver’s” course ?

A.—Captain Bosworth did instruct his steersman not to follow the course of the “Beaver” but that of the “Etta White.”

Q.—Was there any current and in which direction ? would it have been probably noticed and allowed for by a competent pilot on board the tow or either of the tugs ?

A.—There was some current setting in shore and we are of opinion that same would have been noticed and allowed for by a competent pilot either on board the tow or either of the tugs.

Q.—Was the “Thrasher Rock” a generally well known rock previous to the accident ? 10

A.—We are of opinion that the “Thrasher Rock” was not generally well known prior to the accident.

Q.—Did the captain of the “Thrasher” follow a reasonably direct course after the tugs ?

A.—We are of opinion that the captain of the “Thrasher” did follow a reasonably direct course after the “Etta White” but not after the “Beaver.”

Q.—Did the accident take place with the actual privity of either of the defendants ?

A.—The accident did not take place with the actual privity of either of the defendants.

Q.—Did Captain Bosworth take proper and what precautions as captain of a tow 20 should, such as to take notice of the rate and real direction of the progress ?

A.—We are of opinion that Captain Bosworth as captain of a tow did not take proper precautions as to noticing rates of speed and real direction of his vessel’s progress.

Q.—At the time of the stranding what was the value of the “Thrasher,” of the cargo of freight; if no evidence say so ?

A.—There is no evidence to show the value of either ship, cargo or freight at the time of stranding. [Signed] H. Brown, Foreman.

Now first as to the grounds for setting aside the judgment and granting a new trial, namely, not putting to the jury fully the question of negligence. I am of opinion that it was not necessary, nor indeed advisable in the judge to submit a question as to what 30 would or would not in law constitute negligence of the different degrees to the jury. It was sufficient to obtain their assistance in determining such of the questions of fact necessary to determine negligence so as to enable the judge to come to a satisfactory conclusion on any given points. This is exactly in accordance with the law as set forth in the B. C. Judicature Act, 1879, and the Supreme Court Rules, 1880, and with the English law and practice.

By Supreme Court Rules, 1880, rule 290 “except where by the act or by these rules it is provided that judgment may be obtained in any other manner, the judgment of the court shall be obtained by motion for judgment.”

By rule 294 “where at or after the trial of an action by a jury, the judge has directed 40 that any judgment be entered, any party may without any leave reserved, apply to set aside such judgment and enter any other judgment on the ground that the judgment directed to be entered is wrong by reason of the judge having caused the finding to be wrongly entered, with reference to the finding of the jury upon the question or questions submitted to them. An application under this rule shall be to the full court.”

Rule 284 provides that any application for a new trial shall be to a full court which shall for the purpose thereof consist of two or more judges.

By Rule 298 "upon a motion for judgment or for a new trial the court may if satisfied it has before it all the materials necessary for finally determining the questions in dispute or any of them or for awarding any relief sought, give judgment accordingly."

There are other rules affecting the subject which I will not now quote. Our rules are transcripts of what the English law and practice in such cases is.

One particular ground advanced by counsel for the plaintiffs was that the judge had of himself determined as an important element in the formation of his decision that the order of the master to steer after the "Etta White" and not after the "Beaver" had actively 10 contributed towards the accident a conclusion which plaintiffs counsel considered had not been arrived at by the jury.

That the verdict in other respects was evasive and therefore the plaintiffs were entitled to a judgment in their favor or new trial.

The new practice, however, was intended for the purpose of meeting such a case as this and to give power and gives power to supplement the verdict of a jury and if necessary even vary or reverse it, in order, at the least expense of money and time, to reach the substantial justice of the case. For this purpose also the full court has all the powers necessary. The action therefore of the Chief Justice in this respect was in accordance with the law. And while on this point I may mention a notable instance of the exercise 20 of this power in England in a recent case in the Queen's Bench Division reported in the "Times" of 11th January last entitled the Queen on the prosecution of the Lords of the Treasury against the Mayor, &c., of Maidenhead. From that it would seem that Mr. Justice Mellor at the assizes and subsequently Mr. Baron Pollock, Lord Coleridge and Mr. Justice Manisty in appeal had in both courts exercised this power.

The jury in the case in question had found for the defendant; the judge gave judgment for the plaintiff. On appeal before the judges above named the court was divided, two thought Mr. Justice Mellor right on the issues raised, one thought the jury right and the judgment was confirmed. But throughout I can find no suggestion that the judge was bound by the verdict of the jury, although both the judge who tried the case and a majority of the judges of appeal who examined the evidence rejected the verdict on facts. I think therefore that on that ground and the non-submission of what is negligence generally and particularly to the jury, the ruling of the judge who tried the case is sustained by the present law and practice. The same provisions of the law which enable the full court to examine further into the case and decide upon the fullest evidence obtainable render in this case a new trial unnecessary and inexpedient, for I cannot think that at a new trial any further or fuller evidence can be obtained than that which is already before this court. Indeed it is more than questionable whether anything like so full or complete an array of evidence could again be collected as was summoned and put in evidence by the industry and care of counsel on both sides in this case. Were it otherwise 40 we have full power at this moment instead of delivering judgment to defer our decision and summon such evidence as this court might think necessary for its complete enlightenment. But the fact is we have practically already all the evidence now before us that can be usefully collected to enable us to come to a decision on the case before us. We have therefore now to decide on the third and main branch of the application whether the

judgment should be sustained or reversed. On this point also the law speaks with no uncertain sound. Before we can overturn the judgment of a judge who has had the great advantage of having all the witnesses before him, who has observed their demeanor, made his allowance or deductions for hesitation, over readiness or bias on one side or the other, and all those particulars indicative of trustworthiness or non-trustworthiness which I may be permitted to call the evidence of the eye, we must be satisfied not only that his decision was not in the opinion of this full court as fully supported as they could wish in every particular by evidence, but that it is absolutely wrong.

"The rule is (says the learned judge in the case of *The Julia*) not merely to entertain doubts as to whether the decision below is right but to be conclusively convinced that it 10 is wrong."

To come to a just conclusion as to whether the judgment should be reversed or not we have to consider, 1st. The evidence as to the facts. 2nd. The law as gathered from the cases applicable to those facts.

Before entering into these points it is useful to remember that the contract which forms the subject of inquiry is not a contract of insurance nor a contract of pilotage, but a contract of towage with all its legal incidents and liabilities, and after determining the circumstances of the case the question arises what is the general liability resulting from such a contract? What the relation which the law implies between the tug and the tow and what deduction and decision are to be drawn from the application of that principle in 20 the *Thrasher* case. What then are the facts as gathered from the evidence and a consideration of the whole case. I think it was clearly proved that there was a contract of towage made on 21st May, 1880, between the master of the "*Thrasher*" and Mr. Saunders for the B. C. Towing and Transportation Company, Limited; that the "*Etta White*" was hired by that company; that whatever the rights and liabilities of the two steamers between themselves they were (as far as the contract with the "*Thrasher*" was concerned) steamers of the B. C. Towing Company alone and to be so regarded. As to the duty of the "*Etta White*" to the "*Thrasher*" that would be, I take it, the duty of a tug to a tow irrespective of contract. The specific contract of the Beaver's company was to tow the *Thrasher* to Nanaimo and back to Royal Roads for \$500 or to Cape Flattery for \$600. It 30 did not include the taking of a pilot either way, that is clear from the master taking and paying a pilot from Victoria to Nanaimo, refusing to take one there, and paying half pilotage at Nanaimo to avoid taking one from thence to Victoria, all this entirely unconnected with his towage contract. Neither of course was there any insurance in it or it would have been specified. The contract was made on 21st May, 1880. In pursuance of it the *Thrasher*, in ballast, drawing twelve feet of water was towed up by the Beaver through the forward channel in the night past and inside the Gabriola Island and reefs and so safely and easily into Nanaimo where she loaded with coal at the wharf. This apparent facility in going up possibly induced the master to dispense with a pilot coming down. On the 14th July the *Thrasher* was loaded and ready for sea having on board 2600 40 tons of coal and drawing 23 feet 4½ inches of water. At half past seven P. M. on that day Captain Bosworth gave the orders to cast off the ship from the wharf and ordered the tugs to go ahead. This was obeyed and the towage commenced. The vessel started with two tugs ahead, the *Etta White* leading with a hawser eighty fathoms long to the Beaver, the Beaver with ninety fathoms of hawser astern to the port bow of the *Thrasher*. The proper relative position of tow and tug would have been that the bow of the *Thrasher* should have headed on the starboard quarter of the Beaver in line parallel to the line of

length of the Beaver. No course, that is no specific course was set or even inquired for beforehand by Captain Bosworth or at any time on the 14th after his orders to cast off and go ahead from the Nanaimo wharf had been obeyed. He had refused the offer of a pilot to pilot him down, thus he had neglected the warning given him by Mr. Saunders, of the danger of going without a pilot with a vessel like the Thrasher in strange waters and an intricate navigation, even in ballast to fetch a cargo, and a "fortiori" when over twenty-three feet deep in the water. He preferred, however, to pay half pilotage and take the chance. The night was clear and light, the sea smooth and no wind. The vessels went out by the ordinary channel until half or three-quarters of a mile off Entrance Island. Thence we have it in evidence the course steered was that usually adopted by sailing 10 vessels and as I construe Admiral Richard's instructions in exact accord with if not the express words, certainly the spirit and common meaning of the sailing directions as the same are understood and acted upon by the great majority of the sea-faring witnesses who were examined, Captain Devereux, Captain Clarke, Navigating Lieut. E. C. Baker, R.N., Captain Lewis of the Hudson Bay Company, Captain Rudlin and others. Christensen, master of the Beaver, tells us that when he left the deck (presumably no doubt to turn in) at half past eight, the course steered was allowing for ships deviations of the compass, from full half a mile outside of Entrance Island towards where (on the chart) the word "see view" is laid down. That, say in effect the "sailing directions" is a safe course for even sailing vessels and a "fortiori" for steamers, east quarter north. 20

Jagers a steady man at the helm puts that beyond a doubt and says his instructions were to keep that E. course good, and there is no reason that I see to doubt that up to ten minutes before the ship struck this man Jagers did consider he was fulfilling his command by the margin to the northward of east he was giving her and as he swears continued to give her from Entrance Island up to the point where the Etta White took a turn towards the south just before they struck. The Etta White was from a point fully half a mile north of Entrance Island light steered, a course which the master, Henry Smith, described as east magnetic but that he had to steer east by south by the Etta White's compass to make that course good, as on that course their compass was one point out. That they always steered that course in towing from Nanaimo to Victoria. The 30 Etta White took a turn towards the south from five to ten minutes (the jury say some ten minutes) before the ship struck. He also describes the night as quite a clear night with a light breeze along the shore a mirage which he said made the land look rather deceiving. He could see certain of the land marks along the shore but they would appear different in a case of that kind if it were perfectly clear, not enough to ascertain his position. I do not find it anywhere stated that the change in the course of the Etta White ten minutes before the ship struck was the cause of her stranding nor could it be for she was already so far advanced that she could not have turned the whole long string of vessels round and got clear out. The compasses of both steamers and the evidence shewed that an east course magnetic was steered by each steamer from north of Entrance 40 Island till within ten minutes of the time when the ship struck. No bearings or observations were taken either as to land marks or current, or position by either the captain of the tow or the master of either of the steamers. The only attempt was made by the captain of the Etta White just before the tow struck. All the vessels safely out of Nanaimo the master of the Beaver after getting a good offing for setting the usual course turned in and as far as the evidence goes seems like the captain of the tow to have disappeared down below until both were roused probably from sleep by the shock of the ship striking heavily on the rock and bringing the Beaver to with a round turn. The first thing one

next observes is how short handed the tugs were, only the master, engineer and one deck hand, so that if the master goes below there is only the man at the wheel to take charge of her; a marked absence of preparation for the double responsibility claimed by the plaintiffs as her due. The master of the Thrasher after setting the sea watch on board of her for the night also went below (the jury say) at a quarter to nine and did not appear on deck till she struck. He was no sooner gone than his example was followed by his first officer and the care of the tow with a valuable cargo and all her responsibilities at night passing Gabriola and its dangerous reefs was devolved (so the evidence goes) on a seaman of the name of Young who was second mate. Before retiring to rest, however, indeed for some time previously Captain Bosworth had left with the helmsman a fatal 10 order, placed as the three vessels were together, the tow last with her nose pointing away to the starboard side of the Beaver somewhat inshore, the Etta White leading ahead on the Beaver's starboard bow inshore of the Beaver, very much in the shape of a bow, if anything could have insured the whole mass tending bodily to leeward, slowly almost imperceptibly but surely, it would have been to steer the Thrasher along the chord of that arc, and that order was not wanting, for from the time of taking her departure from Entrance Island up to the moment of her striking the helmsman swears and Captain Bosworth in cross-examination is obliged to confess that, in obedience to the captain's order, he steered the Thrasher after the Etta White instead of the old Beaver and this strange order was not communicated to either of the tugs, though 20 the Beaver seems to have always had her head more off the land than either of the three vessels. It was not necessary to add to these influences the effect of an ebb tide and as some witnesses aver an unusual current setting over from Fraser River a mass of fresh water which was said to go up and down the gulf on top of the tides and setting them on to the land, fully to account for the ship finding herself at last on "The Thrasher Rock."

I do not think from the evidence that the set of the current was so strong to leeward all the way as where it first caught the attention of the witnesses, at the place of the catastrophe. The probabilities I think are that at that spot where we hear of a kind of channel there was a sort of 'race.' Neither must we expect that the land marks by which 30 seafaring men would under ordinary circumstances be guided would be anything like as plainly visible at night, however clear, as in the day. The mist from the water near the shore even on a clear night would make the view precarious or as one of the witnesses said "deceiving."

The master of the Etta White swears that he could not ascertain his position from comparing the land marks as he could not see enough of them for the purpose. It is not because a safer course than the one adopted could be pointed out; for that may probably be done in every case, but that the one taken was to be considered wrong; but the question is whether the course actually or practically adopted as originally laid was a reasonable and ordinary one under the circumstances of the case, and of that the evidence of all 40 the witnesses I think sufficiently assures us, no matter which of them the tow or the tug is responsible in point of law under ordinary circumstances for the course. This course, however, was not kept except by compass and at about half past nine the Thrasher was aground in eleven feet of water. Some one was to blame for this, who was it? What was the "causa causans"? and who is to blame for the loss? The tow says the tugs. The tugs say the tow and among other defences reply "inevitable accident." We may as well therefore dispose of that at once.

Inevitable accident is defined to be the act of nature or some event which could not possibly be prevented by the exercise of ordinary care, skill or forethought. Here the Thrasher rock is proved to have been within the course marked out as safe within the Admiralty "sailing directions" and was, for all practical purposes, an unknown rock. It is true that one witness of great respectability avers that he stood on it once some twenty years ago, but then, though a seafaring man, he never reported it to the Admiralty or other public authority to get the sailing directions corrected or had seen it since, so it is no disrespect to him to think the fair probability is that he mistook it for another of several rocks known to be somewhere around in the vicinity of the reef proper which are partly bare at low tide. The jury found it to be a rock not generally known. But in any 10 case it does not appear to me that it was by any means or in any sense inevitable, that the tow and tugs should have been so far out of the course they had at first between them adopted as to have got so close to well known dangerous reefs although within the authorised sailing limits. It was night when, however clear, distances especially on the water are deceptive and land marks by no means well defined. The ship was heavily laden, drawing 23 feet 4½ inches of water. There was plenty of sea room and had they kept the magnetic E. course until they caught sight of the Fraser River Sandheads Light they would not have incurred the slightest risk, so, although the finding of the jury negatives the hypothesis that they were running into danger, still I take leave to think the defendants have not proved inevitable accident.

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Turning next to some of the leading cases to ascertain the law governing the contract of towage attention is drawn to that of the "Julia," 14 Moore P. C. 286, 287, which was much quoted. That though not a case in point was a case of collision between tow and tug, the tug suing the tow for damages. There it was determined that each party in a contract of towage contracts with the other to use proper skill and diligence and that it will not by neglect or mismanagement create unnecessary risk to the other or increase any risk which might be incidental to the service undertaken. If the wrongful act of either occasioned any damage to the other, such wrongful act would create a responsibility on the party committing it if the sufferer had not by any misconduct or unskilfulness on her part contributed to the accident. The Robert Dixon, L. R. 5 Prob. Div. was 30 quoted by plaintiff's counsel as supporting his case to shew that the tug has command of the course, and that it was her duty to have deviated from the correct course, and not doing so was contributory negligence which disentitled her to the damages she sought. But that was a case of salvage and in fact it is a case for the defendants, for the tug having steam power and in that sense having command of the course had no right to go inside the lightship, to run direct into a known danger: that was a violation of the course of maritime law laid down in the "Julia" and would have condemned the tugs in the present case if they had attempted to justify running inside the light ship and beacon buoys off the Sandheads of Fraser River.

"The Christina," Vol. III Part I, Robinson's reports shews that steam tugs employed 40 on all ordinary towage service are bound to be subservient to the pilot on board the tow. The master of the tug must implicitly obey the orders of such pilot except in the case of wilful misconduct or gross mismanagement on the part of the pilot. The master of a steam tug having brought the tow into a collision by disobedience of the pilot's orders, the court pronounced against the claim of the owners of the tug for towage remuneration. Here in this Thrasher case the master of the tow became his own pilot with all the legal authority of such in his ship.

"The Lady Flora Hastings," same report, page 33. There the learned judge Dr. Lushington says: "I am well aware that mischiefs may in some instances arise from pilots having the entire control over steam tugs, and giving directions contrary to the judgment and experience of the masters of steam tugs, conversant as they are with every part of the waters in which they are employed, at the same time I feel that still greater difficulties would be occasioned by two conflicting and independant authorities being exercised in one and the same vessel.

In this Thrasher case there could not be two concurrent authorities each responsible for the course, the pilotage and the navigation. In fact the pilotage law makes it penal for any unlicensed pilot for those waters to act for hire as a pilot there, and this would especially apply here when the master of the tow has already refused one, to bring a ship from the port to her destination. The master of a ship has no more right to expect the master of a steam tug who happens to possess pilotage knowledge on board to use that knowledge to pilot his ship for him and be responsible for it than he has a right to command the services gratis of a medical man who happened to be a passenger on board his ship as to prescribe for a case of sickness on board and make him responsible for his advice.

"The Carrier Dove," Moore P. C. Vol. 2, N. S. 260, 1863, 1865, was a case of collision. There was a licensed pilot on board whose acts were called in question by the owners as being to blame for the collision. The appeal court said there can be no presumption made in favor of the owners because they can only exonerate themselves from liability by proving that the act which occasioned the injury was the sole act of the pilot.

The "Schwalbe," 14 Moore's P. C. cases 241, shows that the "onus probandi" in these cases lies on the owners of the tow ships. The necessity of proving this where there was a pilot in order to claim a statutory exemption shews the state of the law where such exemption cannot be claimed by reason of having no pilot on board on whom it is possible to throw the blame of a collision, and here there was none in the Thrasher. The captain had all the pilotage responsibility of tug and tow on his own shoulders, and consequently full command of the tug.

Smith and St. Lawrence Tow Boat Company, L. R. 5 P. C. 308. This was a case of damages sought for the loss of a ship, "The Silver Cloud," in a fog. There the tug was not responsible, the tow was the dominant power and the tug subservient to it and the tow did not give orders to the tug to stop and therefore consented to proceed in a fog though aware it was dangerous. It therefore and not the tug was responsible for the accident.

Spaight vs. Tedcastle, L. R. 6 App. Ca. 217. The tug towed a ship on a bank by disobeying the order from the tow. The case was argued as one of a ship responsible throughout for the action of the tug. The original and graver error there was disobedience to the orders of the tow which had the right to command and therefore the duty of 40 directing the course and navigation.

The case of the "Energy" L. R. 3 Adm. 48, shewed that the tug was bound to obey the orders of the pilot on the tow (the pilotage, viz.: direction of course and navigation is from the tow) where the pilot generally is as more convenient for watching the navigation, and the pilot (here the master of the Thrasher) is bound to give the orders.

In that case a collision could perhaps have been avoided by the pilot, so the tow could not recover from the tug as the pilot did not give the orders. The injured tug sued the tow and recovered damages.

The case of the "Ticonderoga," 1 Swab. rep., shews the tug has to obey the tow. It is contrary to common sense that the steamer has charge of the tow.

In the "Mary," 5 Prob. Div., we learn that tug and tow have to be under the same authority. I have gone into the American cases, the "Margaret," the "Lady Pike" and others. The principle there when closely looked into is the same as in the English ones, where a steamer is in her own port, going under her own bridges and the like her local knowledge is sufficient and she is expected to have it. But no where, except by a constrained and unnatural construction, can I find that a towage contract from port to port involves also a contract for local knowledge, nothing of the kind is mentioned in the pleadings here, especially such a local knowledge, as would imply actual pilotage knowledge and that of such a coast navigation as that from Nanaimo to Victoria. It appears to me so dangerous a proposition to advance that it has only to be stated to condemn itself.

The case of the "Iona," L. R. 1 App. Ca. 430, was one of collision and negligence; there there was compulsory pilotage to exempt from liability, it was necessary to prove damage occasioned exclusively by default of pilot. In that case the boatswain was stationed as the lookout on the forecastle and remained there but did not keep a "vigilant lookout." So the ship and owners were made liable for damage by collision and here a "fortiori" could not recover any damage so that in order to get the benefit of exemption in Merchant Shipping Act, Sec. 388, the owner must shew there was no default on the part of master and crew which might in any degree have been conducive to the damage. That shews the duty of the pilot is to attend to the navigation of the ship, and that nevertheless the master and crew have to keep a good lookout, and where there is no pilot it equally follows that the duty of attending to the navigation of the ship and the tug falls on the master and crew of the tow, here on the captain of the Thrasher where also there was no lookout whatever. Had there been a good lookout the accident probably could not have happened.

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In the case of the "Sinquasi," L. R. Prob. Div., the tug, the mistake which caused the collision with, and consequent damage done by the ship (Sinquasi) to the pier was not done under the orders of the pilot and he had no time to counteract the wrong manœuvre. Sir Robert Phillimore decided that "when the tug suddenly ported without the order of the pilot (the wrong manœuvre in question) the 'Sinquasi' had no option but to follow him. The tug was the servant of the 'Sinquasi,' and the 'Sinquasi' is responsible for what the tug did." In the opinion of the court the "Sinquasi" is to blame for the collision which was not caused by any default of the pilot. In the "Thrasher" case there was not even a pilot to intervene between the tow and her liability for the servant tug.

The case of the "Robert Dixon," L. R. 5, Prob. Div. 54, decided that where a tug runs a tow 40 into a clearly known danger, such as inside a buoy or an inshore pilot boat placed to warn against a danger, she cannot claim salvage for having ultimately rescued her tow from the danger her own want of skill and prudence occasioned.

When the pilot left the ship she was left in command of the captain and the command remained in the captain during the whole of the transaction. The tug (the Judge considered) was bound to obey the orders of the captain. He had directed the original course of the tug, and that, most prob-

ably (the Judge said) the right one, and of course outside the inshore pilot boat placed especially to warn her of danger. And then the learned Judge says: Assuming that no further order was given by the captain, it was the duty of the tug to use reasonable care and skill, and unless she was ordered to the contrary she had the command of the course; *i. e.* the course which had been ordered, and should have kept it. It was not night; it was daylight. She could see that the ship sagged; she should therefore have altered her course and kept more off shore so as to avert the manifest danger. That was negligence enough to bar a claim for salvage.

In the Thrasher case it was night. The captain gave no course. He accepted that of the tugs as his own, and should have watched it, as pilot of his own ship, to see it was properly kept until they got fairly out into open water. This is not a case of a towage contract turned into salvage; 10 but this principle applies here, that he who seeks damages for the injury complained of must show that he did not contribute actively or practically to create or accelerate the danger which caused the damage. This in the Thrasher case the captain did among other faults by directing the helmsman to steer after the Etta White, and not after the Beaver.

In Spraight *v.* Tedcastle, which I have cited, the case was one of alleged contributory negligence between tug and tow. There there was compulsory pilotage. The tug had attempted to tow the ship across a sand bank instead of going round it. The ship struck on the bank and received damage. The ship owners sued the owners of the tug for the amount. The pilot had signalled the tug to change her course. On the disobedience of the tug the ship did not cast off tow rope. There the pilot was even considered supine, negligent and inactive (the Judge said) on the principle of *causa proxima*, not *remota spectatur*. When the direct and immediate cause of the damage is clearly proved to be the fault of the plaintiff contributory negligence by the defendant cannot be established merely by saying that if those in charge of the ship had in some earlier stage of the navigation taken a course or exercised a control over the course, which they did not actually take and exercise, in which the same danger might not have occurred, that such an omission is contributory negligence if, in the circumstances which happened, it might have been unattended with the damage which followed, or if it had no proper connection with the damage which followed as its effect.

The question is not whether it would have been wiser for the master of the ship (the Ruby) to prevent the tug from taking such a course in the direction of the South Buoy as might bring her so near as she actually came to the bank. The immediate cause must be regarded. That incidentally 30 shows that those in charge of the ship had the power to prevent the tug from taking a particular course; or in other words, the tug is the servant of the tow. Here it is not a question whether it would have been wiser for the tugs, having ample power at command, to have taken a course still further north than they did, or even for the captain of the tow (Thrasher) to have adopted one, but whether the captain of the tow is not altogether responsible for the course of the tugs and their making it good, and whether the captain of the ship actually contributed by his own active interference, negligence, as a *causa proxima* to the damage which occurred. Here he actually, by his orders for steering, directed the ship into danger. It must be borne in mind throughout that to none of the parties was the rock known; to no one but the probably mistaken apprehension or memory of a single ship master who locked it for over twenty years in his own breast, nor was it in the "Sailing Directions." Now, in considering these cases, and especially the "Robert Dixon," it appears to me the words "the command of the course" have been much misunderstood in citing them. The fact is, the legal construction of the relative duty and authority of tug and tow varies a good deal, according to the nature of the object of the suit in each case in which this relation comes up, and according to the side on which the *onus probandi* lies.

A tug which seeks for damages in a case of collision with her tow, or when a contract of ordinary towage is sought to be converted into a salvage service, is in a different position as to the degree of proof required and the points of law arising either in support or rebuttal of a claim from a tug which is seeking payment of or being sued for a breach of a plain contract of ordinary towage. The cases

appear to have been decided more with reference to the particular circumstances under which each suit is brought or defended than from being included in any uniform general category of marine service and subject to a uniform canon of construction applicable to all such cases alike: How could it be otherwise? On so unstable an element as the sea the circumstances are as incessantly changing and varying as the element on which they occur. The facts of no two cases are alike. But if the cases I have cited be right, underneath them all lie one or two clear principles, viz.: that the tug is the servant of the tow, and whether a pilot is taken or not, is bound to obey and look to the tow for the course to laid down, the lookout to be kept, the orders from time to time to be given in the voyage, the general course to steer, and, in short, what is generally understood as implied in the words, the navigation of a vessel.

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The tugs are bound to find proper motive power, machinery, men and materials to carry out the towage service they undertake effectively; to use all reasonable means and due diligence for accelerating the arrival of the tow at her destination, avoiding all ground which they know to be dangerous on the way, and to use all due diligence towards the tow in carrying out her contract.

The tow, on her side, as in "the Julia," has her relative duty to perform towards the tug. She has, like the tug, (in Lord Kingsdown's words), "to use proper skill and diligence in completing the contract of towage. Neither must she (any more than the tug) by neglect or misconduct create unnecessary risk to the tug or increase any risk which might be incidental to the service undertaken. If the wrongful act of either tug or tow occasioned any damage to the other such wrongfnl act would create a responsibility on the party committing it, if the sufferer had not by any misconduct or unskillfulness on the part of the vessel damaged contributed to the accident." If it had of course it could not claim damages.

Another general principle underlies all these cases, and that is exactly in accord with the evidence in the present case, that the responsibility and consequent liability of the master of the tow, pilot or no pilot, never ceases, although it may vary in degree, until she is in her owner's port again. Now, applying these principles to this case, upon a consideration of all the authorities cited, I think the owners of the tow have no claim against the owners of the tugs on account of the loss of the Thrasher. Even assuming that the contract of towage did imply a contract for reasonable skill and diligence, it was only for the towage service itself, and did not include pilotage or navigation, or the necessity for any unusual or extraordinary precaution beyond avoiding any manifest dangers. The power was admittedly ample and the tackle and machinery and boats sufficiently good to have towed the vessel safely under ordinary circumstances in the course actually taken—the usual towing course there—nearly magnetic east $\frac{1}{4}$ north from a point of departure half to three-quarters of a mile north of Entrance Island, and such as to meet all ordinary setting towards the land from current or ebb tide, whlch were the only two on-shore forces on a calm night whose action they might reasonably expect to fear.

Nay, further, that if in the exercise of a towage duty calling for ordinary skill and caution the master of the Beaver was actually guilty of negligence in going to bed after leaving a good man at the wheel with instructions to keep the course, and seeing, as he thought, everything safe and a safe course set, with the captain of the tow on deck, and the master of the Etta White on the alert; or, if there was negligence in the master of the Etta White in not ascertaining about this usual (or even unusual) current from Fraser River, or the exact position of the whole moving mass of vessels sufficiently long, instead of only ten minutes before the course was changed to the southward of east, and supposing the tugs responsible, then in any, or all of those cases I do not think the tugs were the *causae causantes* of the catastrophe. The evidence of Jagers, the mate, as to all the towage; of Madigan, the engineer, as to every half hour of it, and of all that occurred at the moment of stranding, as well as of the masters of the tugs themselves, proved most distinctly that the Thrasher, by her steering inshore for over "an hour" before the accident, and after the Etta White, on the star-

board bow of the Beaver, increased the sagging of the mass to leeward to a dangerous extent up to the actual catastrophe. But for this, my opinion, from the evidence is, that the ships would have cleared all danger, even including what I must call the unknown danger of the Thrasher Rock ; for it is not reasonable to think that in an hour and a half to two hours of such steering (it began off Entrance Island) the sagging to leeward occasioned by that active cause alone did not exceed the 50 or even 100 yards north of the rock which would, from the evidence, have taken the Thrasher entirely clear of rock, reef, and everything in the shape of danger. As it was, she was considerably beyond the line of danger prescribed by the chart and directions as the limits of approach, and in daylight would have had a right to consider herself safe. The master of the Etta White swears that the night, though generally clear, did not enable him to see enough of the usual landmarks to enable 10 him to judge with approximate certainty of the position of the vessels when he began to change the east course to one a little south of east, and he was obliged to go into his room to look at the chart to ascertain more of their exact position when the Thrasher struck.

The tug might have done more, but was not bound to do so, and under the definitions "*Campbell on Negligence*" gives to negligence, there was none here to affect the tow ; negligence in several respects perhaps, but nothing wilful or against knowledge, and they suspected no danger. Had they been themselves lost on the rock perhaps there would have been negligence enough to have prevented them from recovering against the tow for dragging them to destruction, but certainly not such as to make them liable to the tow for the loss of the Thrasher from want of ordinary skill and caution.

On the other hand, however, I do consider, from the authorities and the evidence, that the tug 20 is the servant of the tow , that Captain Bosworth, by paying half pilotage to get rid of a pilot, thereby became in law his own pilot at Nanaimo, and by his orders at the wharf became so in fact ; that he should then have laid the course properly before starting and given it to the tugs to follow at their peril ; that having been on the poop until $\frac{1}{4}$ to 9 and having seen the course of the tugs, which I consider to have been sufficiently indicated by the sailing directions and chart to have been a usual and safe course, even for a sailing ship without steam, he must be taken to have adopted this as his own course and be responsible for it. It was then his duty to have exercised vigilance to have seen that course was kept good all the way until thoroughly clear of all possibility of danger. His it was to watch currents, sagging and deflection out of the course, and to have corrected them by drawing more and more to the northward until Cowichan Gap was well opened, or, if too dark for that, till 30 he could get a cross bearing from the Fraser River light. He had ample men and means at command for the purpose, but instead of that, forgetful that a master's responsibility never ceases, as the evidence concurring with the law declares, until his ship is in the owner's port and he in his own home, he goes to bed, and acts as though he had no concern whatever in the matter ; a course in which he is imitated by his subordinate officer, and not content with this leaves the fatal legacy behind him of a constant direction, which he does not communicate to the other vessels, to turn the ships head constantly inshore of the Beaver, and after the Etta White, an active contribution towards the fatal result, which coupled with the other faults of omission constitute such contributory negligence on the part of the ship, as in my opinion is the "*culpa lata equipranda dolo*" and disentitles the tow from making any claim for the damage laid against the tugs even had blamable negligence been proven 40 against them, or that which was proven against them he considered as blamable. It was not a question as to which would be the wisest, which the most prudent course for a heavy ship, twenty-four feet in the water to take ; that was for Captain Bosworth to settle, and he did settle it when he gave the orders of a pilot to cast off, and go ahead. He chose or adopted what was, if kept with vigilance, a safe and prudent course, from Entrance Island and is entitled to the benefit of that fact. His faults were that he did not watch and see that it was kept good, until safety was beyond a peradventure, and secondly, that he did give the steering directions to follow the Etta White which actively contributed to the accident. Even with a pilot mere ordinary watchfulness is not enough, master and men have to be even on the alert to carry out his directions and watch against danger. The case of the "Iona" is strong on that point, for there even when a watch was set and at his post, the ship was con- 50

demned, because he was not sufficiently vigilant in his watch. To attempt to throw the legal responsibility of the tow on the tugs is to create a far greater danger to the ship owner than to enforce a salutary rule, which has been the result of long years of practical marine experience. The immediate effect of creating such a divided responsibility by taking the responsibility from the tow, and casting it on the steamers would be (in the words of Dr. Lushington in the case of the "Duke of Sussex") to "create a conflict of authorities which would lead to inextricable confusion and be highly prejudicial to the owners of vessels." All the master of a tow would have to do, if the principle contended for by the plaintiffs in this case were true, if a contract of towage were, however indirectly to imply such a knowledge and practice as would avoid dangers such as here incurred, would be to enter into a contract of towage, dispense with both pilotage, and to some extent even with insurance, and certainly (so 10 far as dangers of a course were concerned) with any anxiety as to navigation. If a pilot was necessary for a stranger, in strange waters, it was necessary here, and if necessary when going up light, drawing only twelve feet, a "fortiori" was it indispensable for a vessel drawing twenty four feet with a valuable cargo: ship freight and cargo worth \$100,000 and outward bound. The navigation about Gabriola Island was not the navigation of a home port with every inch of which the master of a tug hailing from thence might be supposed and required to be familiar, but a route requiring special nautical skill, and that unremitting attention to factors likely to disturb the course, which only the full resources and equipments of a square rigged vessel could satisfactorily afford.

Although therefore I do not agree with some of the premises of the learned judge, who tried the case, e. g., in his doubt as to the course, practically laid down by the sailing directions, yet the law 20 of negligence as laid down by the learned judge, the principles of construction submitted to the jury, are I think borne out by the numerous authorities referred to.

I have already dealt with the question of inevitable accident, I have not laid stress on the existence of kelp in the neighborhood of the rock, even assuming the night to have been clear enough to see it, and the people of the tug able to leave their towing to look after it. The case could not turn on that, for every channel and line of traffic along the inland channels and waters of British Columbia is full of kelp, frequently of very great length, 50, 70, 100 or more feet long; and although a neighbour whose acquaintance ships would avoid does not necessarily, of itself, imply danger. If that of itself were to be a danger which ships and tugs were bound at their peril to avoid, navigation along our inland coast (if I may use the phrase) would be impracticable. Moreover the case does not depend upon it. It could not be here a "causa causans" or affect the relations between tug and tow. 30

In conclusion I may say that looking at all the law and evidence of the case I am of opinion that in this case the contract was one of towage, that the principle applies to it, that the tugs were the servants of the tow, hired by the tow, paid by tow, discharged by the tow; that while it was the duty of the tugs to find sufficient towing power, men, materials, and skill for carrying out the towage contract effectively; and they were under obligation to use due diligence and care in so doing, and to avoid all known dangers (of which the Thrasher rock was not one) they were not responsible for the navigation of the tow, or of the course generally. That it was the duty of the tow (the Thrasher) and it did actually, commence to pilot the vessels, and attend to the navigation generally, and the tow was 40 responsible for the course, was in fact master of the course. That as a general rule there cannot be two dominant authorities over the course in the same towage except where separated by emergency, danger, inevitable accident, or the like.

I think there was a certain amount of negligence in the tugs, in not asking for a course before starting, and in not looking more (although not responsible therefor) to see, whether they were generally keeping the course, but that such negligence, though blamable, was not the "culpa lata" of Campbell. In case of accident to themselves, this might, however, have told against them. I consider the course which was commenced and which was adopted by the tow (East quarter North) was a reasonable and proper one for steamers of ample power, and on a clear calm night, if kept with

vigilance. I am of opinion also that the master of a tow never ceases to be more or less responsible (pilot or no pilot) so long as he is afloat in the ship under his command. That when he declines to take a pilot in pilotage waters, especially in a strange coast, he takes the risk of pilotage on himself. That it would be fraught with constant danger to ship owners to recognize a divided authority in towage, beyond the necessary reciprocal duties of the tug and tow to each other, e. g., to avoid collision and the like. That if tugs are to become responsible beyond the mere towage contract, and such reciprocal obligations, it should be so declared by statute, and the masters obliged to become, be registered, and act as pilots, and carry sufficient officers and men for such additional service, and the fact be proclaimed to the world. That in this case the tow by the steering order to follow the Etta White who was inshore and neglect the Beaver, on her port bow, did actively contribute to setting the whole 10 towing mass towards the shore, and as part of the "causa causans," to the subsequent disaster; and that by neglecting to take a pilot or to give the course, and see it kept, and by the lack of vigilance of the tow in watching currents, and tides, and guarding against deflections from the course, the tow was guilty of the "culpa lata" equivalent to "dolus," culpable contributory negligence, which would have prevented the owners from recovering even if the tugs had been otherwise legally responsible.

I also am of opinion that the findings of the jury, and the judgment of the Chief Justice, were substantially correct, and must be affirmed, and I give judgment accordingly.

BEGBIE, C. J.—I think I cannot adhere to the judgment of the 18th July. On that occasion I appear to have been misinformed on two points as to the Admiralty sailing directions. 1st. There is no express compass course given for vessels leaving Nanaimo to get into the Gulf of Georgia, but only for vessels entering Nanaimo from the gulf, and so in leaving, the master of a ship has to consider how he can retrace his steps. But there appears to be no difficulty about doing that. 2nd. The neighborhood of Gabriola reef stigmatized in the sailing directions as "broken ground" lies not as I supposed to the eastward where the stranding occurred, but to the westward of the reef. Nothing is said in the "directions" as to the east side of the reef. In other respects my opinion of the facts is not altered. Nor do these variations seem important to charge the defendants; rather, perhaps, the other way. It still remains, that any intelligent school boy put in charge that night could have safely directed the ships course by looking at the compass, at Entrance Island light, and at the chart and sailing directions. 10

It still remains that the tugs were not bound to have knowledge of that rock, of whose existence in my opinion and in that of the jury, nobody was aware. It still remains that the unusual and improper orders of the captain of the tow, not communicated to the tugs, (viz.: to steer all away, and to the southward of the course laid by the tugs) at once forced them aside into the scene of shipwreck for this mis-steering was probably the most effective cause of the deflection from the course laid) and lulled them into a false security by intimating in the commonly recognized way that Captain Bosworth thought they were 20 giving the reef an unnecessarily wide berth. It is to be remarked that this part of the gulf, to the eastward of Gabriola reef, seems to be avoided by cautious mariners, not because it is known to be dangerous, but because it is not known to be safe, and in fact one part of the sailing directions indicates a course two or three miles further to the eastward than is now known to be absolutely necessary for safety. But the absolutely dangerous reef seems to extend perhaps a mile beyond what is marked on the chart as the limit of danger, viz.: enclosed in a dotted line; and to fall short by a mile and a half of the limits of safety as mentioned in the sailing directions, this additional part (not laid down in the chart) consisting of pointed rocks, with gaps between, which accounts for the impunity of some ships there, but all one reef, probably, as the Alps are one chain of 30 mountains, with high peaks and passes separating them.

I still remain of the opinion expressed by me at the trial that it is the tow alone, as between tow and tug, who has to direct the course, that if the directing mind on board the tow (whether pilot or captain is quite immaterial) choose to abstain from giving orders, and acquiesce without contradiction in the course taken by the tug, the tow alone is responsible. The St. Lawrence Towing Company's case, 5 L. R. P. C. 308 as the tug would be, so far as her right to towage is concerned, if she ventured to disregard an order, even a wrong order, from the tow. (The "Christina," 1 W. Rob. 29, 33.) Every reported case to which we have access is quite inconsistent with any other conclusion, and the tugs in this case cannot be charged unless it was their duty to select and direct the course. 40 They were far out of any harbor, far from any visible or known danger, far from Victoria, their home port, nor were they disobeying any order from the tow; at least if they were disobeying, it was in the direction of safety. They declined to go so much to the southward as was signalled by Captain Bosworth. So that this is exactly the reverse of Spaight vs. Tedcastle in every point, where the tug was in her home port, was disobeying the orders of the tow, and ran upon a well known shoal. If indeed the orders of the tow had been driving the whole mass upon evident destruction, if the tow had been hanging so wide on the Beaver's starboard quarter as to be sending her, in full view, on to the

Gabriola beacon ("a terror to mariners") the tugs would have been justified in disregarding her employer's pertinacious misdirections, and in reversing their course, and towing him even against his will into safety. But the onus of justifying such disobedience of orders would have been on the tugs, and their services would then probably have been no longer towage, but salvage services, entitling the tugs to a reward proportioned to the responsibility undertaken by them in such disobedience, (Spaight vs. Tedcastle and the Christina) and in acting as unlicensed pilots, and proportioned to the skill and judgment they had displayed, and the loss they had adverted.

It seems idle to say that it was the motive power which dragged the ship on to the rock. This is a mere truism. It is of course perfectly clear that without motive power 10 of some kind she could not have got there; she could never have left Nanaimo at all. But suppose the captain had by any means, secured some other motive power, say, a fair wind, that he saw his ship heading from Entrance Island into an apparently open gulf at four knots an hour, and then went below and let her drive. In an hour more he is aground, could he be heard to say, the wind drove him ashore? There is a vast difference, says the plaintiff. The wind is an unintelligent motive power; the tug is supposed to be directed by a common seaman's local knowledge. That is quite true, and that is all that the tow has here bargained for. What that is, is shown in the "Robert Dixon," and in Spaight vs. Tedcastle. The persons handling the tug are bound to know the meaning of local beacons, and of signals from the tow, and to conform to these last reasonably. 20 They are bound to avoid running inside a visible moored pilot boat, even in adherence, but an unreasonable adherence to the tow's last directions. They are bound to know the shoals in their own harbor so far as to be responsible if they run on a well known shoal there in disobedience to orders from the tow. But I nowhere find it laid down that they are bound to be acquainted with all the unmarked (in this case unknown) dangers in the 120 miles over which their contract of towage extended. But then it is said that Christensen the master of the Beaver had a pilot's knowledge; that he had formerly been a pilot for these very waters, and instead of seeing to the safety of the tow, he too, like Captain Bosworth, had gone below, and was in bed. The answers to this are manifold. Christensen had ceased to be licensed as a pilot for these waters for many years. He 30 had not contracted to act as pilot, nor to give the tow the benefit of his pilot's knowledge (if any), he dared not have done so, he would have been criminally punishable if he had. Captain Bosworth knew that he had not contracted with Christensen as a pilot, i. e. for a pilot's skill and care, for he had paid half pilotage to another man before leaving Nanaimo. This he never would have done if he had thought that Christensen, whom he had then engaged, could possibly have undertaken the duty. To hold the tugs responsible in the present case would be to encourage every captain of a ship in abandoning all care and charge so soon as he made fast to a tug, and refused a pilot and it would penalize a towing company's employment as tug master of any man who could have the reputation of possessing any but the average skill and knowledge of a common seaman. 40 The mischief which would necessarily flow from these two causes are the measure of the error of the plaintiff's contention.

There was therefore no such dereliction of the tugs duty as to make them responsible. There is very gross negligence, and active malfeasance (viz., mis-steering) on the part of the tow, which latter error was in my mind the "causa causans" of the whole calamity, and if it be said that in a case of collision or stranding, "causa proxima, causa causans spectanda est," and that the proximate cause of the stranding was the change of course by the Etta White a few minutes before the collision, this was not at all clearly

made out in the evidence, but rather the contrary. It was rather probable, but not certain, as the plaintiffs on the trial contended, that the ship was at that time thoroughly involved, and that at that time nothing would have certainly saved her except a complete reversal of the course by the tugs, which would have been a salvage service probably. Moreover the change of course at that period was merely an act of obedience to the signals persistently given by the tow (from her steering away) to turn more towards the starboard, and even at the last critical moment, it is by no means clear that the tow might not have passed unharmed through some gap in the reef if she had steered straight after the Beaver. The change of course by the Etta White is not therefore in my opinion in any way established as even the immediate cause or occasion of the catastrophe. This is 10 therefore not a case for exempting the tugs from liability by reason of contributory negligence on the part of the tow. That would be where the tugs primarily caused the loss and the tow merely accelerated it, or facilitated it. I think it was the negligence of the tow which was primarily and wholly to blame, and the conduct of the tugs is comparatively unimportant. It might be different if the tugs were now suing the owners of the shipwrecked tow for towage. I think therefore the judgment ought to stand.

The appellants on the 20th day of April, 1882, gave due notice of appeal to the Supreme Court of Canada and on the same day furnished security for such appeal, which security was on the 8th day of May, 1882, allowed by the Chief Justice of the Provincial Court and the following is such allowance:

[NAMES OF PARTIES.]

I, Sir Matthew Baillie Begbie, Knight, Chief Justice of British Columbia, do hereby certify that the above named plaintiffs, as appellants, have given security to my satisfaction to the extent of five hundred dollars, that they will effectually prosecute an appeal to the Supreme Court of Canada against the judgment of the Supreme Court of British Columbia, rendered herein on the nineteenth day of April, ult., and that such security has been given by a deposit receipt payable to the order of the Registrar of this Court, and lodged with the said Registrar, a copy of which deposit receipt is hereunto annexed, and I do further certify that I have and do hereby allow the said security and the said appeal.

Dated at Victoria, and given under the seal of the Supreme Court of British Columbia this eighth day of May, one thousand eight hundred and eighty two.

[L. S.]

MATT. B. BEGBIE, C. J.

SPECIAL CERTIFICATE OF DEPOSIT.

Garesche, Green & Co, Bankers, No. 433, \$500, Victoria, B. C., April 20th, 1882. J. J. Valentine for Williams, Dimond & Co., have deposited with us five hundred dollars to the credit of J. C. Prevost, Registrar, payable to his order at thirty days notice of withdrawal on return of this certificate properly endorsed.

GARESCHE, GREEN & Co.

On the 6th day of June, 1882, the following order was made by a judge of this court:

[NAMES OF PARTIES.]

Upon the application of the above named appellants, upon reading the affidavits of Theodore Davie and George Marshall Bowrinot filed herein, and the exhibits therein referred to, and the certificate of the Chief Justice of British Columbia, dated the eighth day of May last, and upon hearing the solicitor for the appellants. I do order that the above appellants have three months additional time over and above the time limited by the rules of this court wherein to bring their appeal and file their printed case with the Registrar of said court.

H. G. TASCHEREAU.

Dated at Chambers this 6th day of June, 1882.

And on the 9th day of September, 1882, the following order was made by the Chief Justice of this Court.

[NAMES OF PARTIES.]

Upon the application of the appellants, and upon reading the affidavits on file and the contents filed, I do order that the plaintiff's appellants do have three months further time, dating from the 6th day of September, 1882, within which to file the printed case with the Registrar of this Court.

W. J. RITCHIE, C. J.

Dated this 9th day of September, A. D. 1882.

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In the Supreme Court of Canada.

C A S E

RESPECTING THE

STATUS OF THE SUPREME COURT OF BRITISH COLUMBIA,

AND THE

POWER OF THE LEGISLATURE OF THAT PROVINCE TO LEGISLATE
IN RESPECT OF PROCEDURE IN THAT COURT,

AND THE

RESIDENCES OF THE JUDGES THEREOF.

REFERRED TO THE SUPREME COURT OF CANADA FOR HEARING AND CONSIDERATION
BY HIS EXCELLENCY THE GOVERNOR GENERAL IN COUNCIL UNDER THE
PROVISIONS OF SECTION 52 OF THE SUPREME AND
EXCHEQUER COURT ACT."

CASE.

Important questions requiring an early and definite answer affecting the status of the Supreme Court of British Columbia, and the power of the Legislature of the Province to legislate in regard to procedure in that Court and the residences of the Judges thereof, having been raised on the hearing of what is commonly known as the "Thrasher Case," had before Sir M. B. Begbie, Chief Justice, Mr. Justice Crease and Mr. Justice Gray of that Court, under circumstances not, it is thought, admitting of an appeal to the Supreme Court of Canada, the opinion of the Supreme Court of Canada is desired by His Excellency the Governor General in Council upon the following questions referred under the provisions of section 52 of "The Supreme and Exchequer Court Act":

1st. Is the Supreme Court of British Columbia a Provincial Court within the meaning of the 14th sub-section of section 92 of the British North America Act?

2nd. Has the Legislature of the Province exclusive legislative authority over the procedure in all civil matters in the Supreme Court of the Province? If not, to what extent has it such authority?

3rd. If that Legislature can make rules to govern the procedure of that Court, can it delegate this power to the Lieutenant Governor in Council?

4th. Is the "Judicial District Act, 1879," British Columbia, within the powers of the Legislature of that Province? If so, does it apply to Judges appointed before that Act came into force?

5th. Are the following Acts passed by the Legislature of British Columbia, namely:

The "Better Administration of Justice Act, 1878" (42 Vic., c. 20, 1878.)

42 Vic., c. 12 (1879), An Act to amend the practice and procedure of the Supreme Court of British Columbia, and for other purposes relating to the Administration of Justice.

44 Vic., c. 1, An Act to carry out the objects of the "Better Administration of Justice Act, 1878," and the "Judicial District Act, 1879."

So far as they relate to procedure in the Supreme Court of British Columbia within the legislative authority of the Legislature of the Province?

It being understood that, with the leave of the Court, any act, ordinance, commission or official document or paper bearing on the questions referred, may be cited on the hearing; the following opinions of Sir M. B. Begbie, Chief Justice, Mr. Justice Crease and Mr. Justice Gray of the Supreme Court of British Columbia are submitted for the information of the Court.

SEWELL AND OTHERS, PLAINTIFFS;

versus

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THE B. C. TOWING AND TRANSPORTING CO., LIMITED, { DEFENDANTS.
AND THE MOODYVILLE SAW MILL CO., LIMITED, }

COMMONLY CALLED THE "THRASHER CASE."

SIR M. B. BEGBIE, C. J.—The argument in this case has arisen under the following circumstances:

The plaintiffs, the owners of the ship "Thrasher," completely wrecked on the 14th July, 1880, while being towed by the tugs from Nanaimo, have commenced an action in the Supreme Court against the owners of the two tugs, alleging that the loss was occasioned by the neglect and misconduct of the tugs, and they claim \$80,000 damages. Certain issues of fact were tried before myself and a special jury in June last, and on 12th July I gave judgment in favor of the defendants, mainly in accordance with the findings of the jury. The plaintiffs were dissatisfied with my charge to the jury, with the findings, and generally with the judgment; and they

wished to obtain a new trial, or to have judgment entered up for them, and to apply immediately to the full Court for that purpose. But the local Act, No. 1 of 1881, had in the meantime come into force on the 28th June last, the 28th section of which enacts that a full Court shall only sit once in each year, on a day to be named in the rules of Court, and by section 32 such rules were to be made by the Lieut.-Governor in Council. A full Court of the Supreme Court here had sat on the 27th June, and no day had been as yet appointed under the authority of the said Statute for the sitting of the full Court, and it evidently might not be appointed for a considerable time. It was not concealed on the part of the plaintiffs that if the opinion of the full Court here should be unfavorable to them, they intended to take the case by way of appeal to the Supreme Court at Ottawa; but that Court does not generally take an appeal direct from a *nisi prius* decision. I therefore suggested that the plaintiffs should apply to that Court for special leave to appeal direct, and authorized them to state that in my opinion, from the magnitude of the amount at stake, the importance 70 of the points of law involved and, above all, the indefinite delay which very recent local legislation had imposed upon any application to the full Court here, I thought it a case in which this unusual sort of appeal should be entertained, if consistent with the practice of that Court. An application to that effect was accordingly made to the Supreme Court of Canada, but that Court declined to entertain any appeal until the *nisi prius* decision had been submitted for review before the full Court here. An application was then made to myself in Chambers (7th November), and ultimately to all the Judges on the 24th November, requesting that a full Court might be held by us forthwith of our own authority; and the ground was taken 80 that the above sections 28 and 32 were *ultra vires*, unconstitutional and void, so far as they hindered this. A notice, however, had then been recently published in the *Gazette* intituled a "Report of a Committee of Council approved by the Lieut.-Governor," in which it was recommended that certain alterations in the rules of practice heretofore in use should be made, and also that a full Court should be held on the 19th of December. I therefore desired that the application should stand over until that day, when the validity of the objections to the above sections might be considered, and, if overruled, that the application might then be made to us as a full Court; and that notice of that order should be given to the law 90 advisers of the Crown.

On the 19th of December accordingly the three Judges now in Victoria (Mr. Justice McCreight being detained at Richfield) sat together,

not as a full Court, but to determine whether we were then lawfully sitting as a full Court. A technical objection was immediately taken that even assuming the validity of sections 32 and 28, no Order in Council had ever been made, but merely a report of a Committee of Council had been approved by the Lieut.-Governor, in which a sitting on the 19th December was recommended. As this was a matter which could readily be remedied, however, and as the Attorney General was in attendance, we 100 asked him if he could remove the doubts which had been cast on the validity of the clauses. He said that he felt sure he could do so, and was perfectly ready to go on, but that he felt some difficulty as to his appearing to interfere in a case in which he was not retained on either side. As a grave constitutional objection appeared to us to be involved, striking at many acts of the Local Legislature for which he is very properly responsible, we gave him at once a *locus standi* as *amicus curiae*. We then asked him to point out the words of the British North America Act which gave any authority to the Local Legislature to regulate the civil procedure of the Supreme Court, and he referred at once to the final words of section 92, 110 sub-section 14. But as soon as it was suggested that those words seemed to be entirely confined to civil procedure in Courts constituted, made and organized by the Province, and that this Court was by divers sections of the Act entirely taken out of that category; and that every topic of legislation not expressly given to the Local Legislature is by section 91 expressly given to the Dominion Legislature; he said that was to him an entirely new point, and he requested time to consider his argument. We adjourned accordingly, not as a full Court, but to consider the question whether we were then sitting as a full Court, until the 5th January. The Attorney General then said that he did not feel that he could not properly advise us 120 as *amicus curiae* until he had heard Mr. Theo. Davie's argument of the 24th November. We requested Mr. Theo. Davie to repeat his argument, and adjourned the consideration of the question until Wednesday the 11th January. On that day, however, the Attorney General found himself unable to attend, and we further adjourned till Friday, the 13th January. On that day Mr. Theo. Davie repeated his argument; and the counsel for the defendants declining to say anything, the Attorney General commenced as *amicus curiae* his statements of the considerations which ought to guide our judgment, beginning with a review of the circumstances which led to the formation of the colony; but not concluding, he asked to be allowed to 130 continue on Saturday. On Saturday he asked for a postponement till Monday; and on Monday and Tuesday, the 16th and 17th, he concluded a

review of the early history of the Colony and of Confederation at very considerable length, and discussed much less minutely the clauses of the British North America Act to which we had drawn his attention. We could not allow Mr. Theo. Davie to reply upon the observations of an *amicus curiae*, and we adjourned to deliberate on the conclusion to which we should arrive.

The main line of argument, irrespective of the British North America Act, suggested by the Attorney General, so far as I understood him was as follows: The Colony of British Columbia was originally established by settlement, not by treaty or conquest, and so had a wider and more indelible sort of legislative power. That power is continued since the Union and retained by a sort of transmission or inheritance even in its altered condition of a Province. The Legislature of the colony was completely sovereign, having even power conferred on it to alter its constitution by internal legislation and to adopt a different form of Legislature. He alleged that prior to Confederation the Colonial Legislature alone, and without any Imperial interference, had wholly organized, maintained and constituted the Supreme Court and the Judges thereof, and possessed despotic power over it and them, and the whole rules of procedure and practice of the Court, to the minutest detail. He said then, applying the British North America Act, this power is continued to the Province, the Legislative Council of which, alone and without any extraneous aid, has even power to create here a Court of Appeal from the Supreme Court. Further, he maintained that when the British North America Act came to be applied to the colony, and to the Supreme Court, nothing therein contained altered or affected this relation. The Supreme Court is a Provincial Court, and by virtue of that epithet is within the express words of section 92, sub-section 14. He urged that section 96, which directed that the Judges are to be appointed by the Governor General, merely stipulates which of several representatives of the Crown shall exercise that particular branch of the prerogative of the Crown—that when once the Judge is appointed, he is a mere Provincial officer. So as to the maintenance of the Judges, that is merely a pecuniary arrangement between the Province and the Dominion. There is nothing in that to impair the “omnipotence” of the Local Legislature. The expressions of Lord Selborne in *Regina vs. Burah* (3 Appeal Cases Privy Council, 905), are decisive, and express, he said, to show that a Local Legislature such as ours is by no means the delegate of its creator, but has within its own limits powers as plenary and supreme as the Imperial Parliament itself. Then, he said, section 129 of the British North America Act

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is quite clear. Provincial officers are thereby made expressly subject to the control of the Provincial Legislatures. From his point of view section 130 has been quite misunderstood. It does not mean that any officer in the Province (at the moment of Confederation) who has to deal with any matter outside of section 91 is to be an officer of Canada, but it applies to every officer of the statutory Province, and provides that unless his duties are wholly outside of those matters, he is not to be deemed an officer of Canada. And various passages were cited from Doutre and other text writers which established, as he alleged, the pre-potent, inalienable, continuing authority of 180 Local Legislatures. He said that at all events, the point before us for consideration is a question of procedure; how to get a matter reviewed by the full Court. That is beyond dispute embraced both by sub-section 13 of section 92, as a matter of "civil right;" and as being a step in the "administration of justice in the Province" by sub-section 14, both which classes of topics are by section 92 placed exclusively within the grasp of the Local Legislature, since this possesses the plenary powers of the Imperial Legislature, and the Imperial Legislature has certainly legislated directly on procedure. Lastly, the Attorney General suggested to us that our hands were tied by our own decisions; that all the three Judges now in Victoria, had, 190 in different cases, affirmed that the capacity of regulating procedure resided, solely with the Lieutenant-Governor in Council, viz. : in *Saunders v. Reed*, before myself, in *Harvey v. Corporation of New Westminster*, before Mr. Justice Crease, in *Irving v. Pamphlet*, before Mr. Justice Gray.

Before proceeding to examine the British North America Act, *i.e.*, before discussing the real question at issue, I shall endeavor to explain or rectify some errors in much that has been thus pressed upon us. The Attorney General appeared to me to be frequently misled by the use of the term "Province," "Provincial" as applied to a court, or officer; which has a peculiar meaning when used of any of the members of the Dominion after 200 the application of the British North America Act. But before 1867 the three original partners were equally called "Provinces," and they are so termed throughout the Act. And in reading that Act, and also perhaps in reading some of the judgments in the different courts of the Dominion, it is sometimes necessary to consider whether the old or the new political entity is intended. When the new and the old "provinces" are sharply contrasted, as in section 129 of the British North America Act, all ambiguity is avoided by using the names of the provinces as they existed previously to, and as they were to exist after Confederation. In other parts of the Statute it is left to the context to explain the ambiguity. There is also a further 210

ambiguity in the use of the epithet "Provincial," which when applied to an office or department may mean that it is wholly the creature of and dependent on the Province, or merely that its field of operations is wholly confined to the Province. We may with equal propriety speak of a Provincial Lieutenant Governor or a Provincial Deputy Adjutant General, or, on the other hand, of a Provincial Minister or a Provincial Superintendent of Education. But the same epithet means two very different classes of officials. The former are allotted to, the latter derive from, the Province. In the one case are meant officers appointed and authorized by some power from without, *i.e.*, by the Dominion to perform certain duties in the Province. In the other case, the officials draw all their authority from within the Province itself. The former owe no allegiance to the Province, nor any duty, except, indirectly, having to carry out, according to their respective commissions, the laws duly established in the Province, whether common law or statute laws ; and as to statute laws, whether of Imperial, Dominion or Provincial enactment. And see accordingly the clear expressions of Chief Justice Ritchie in *Valin v. Langlois* (3 Can. S. C. R. 20). They are not however responsible to any Provincial authority, but only to the Dominion, whose creatures they are and whose mandate they bear. The latter class of officials owe allegiance to the Province, and are under its sole authority, being of its creation ; and I think this distinction has been sometimes lost sight of in discussing the British North America Act, leading to apparent anomalies in that Act which do not really exist. It is scarcely possible to avoid some confusion of expression, for it might be misleading to call a Superior Court in any Province a Dominion Court simply. That epithet in strictness, perhaps, might imply a Court which has jurisdiction throughout the Dominion. The proper notion of a Superior Court in any Province seems to be that it is a Dominion Court, assigned by the Dominion to administer the laws in such Province.

It is also, I think, quite an error to suppose what was contended at great length before us, that any of the legislative authority existing in any colony or dependency before Confederation, can continue for one moment to survive the admission of such colony or dependency into the Dominion under the British North America Act, —or that any dependency so admitted, and thenceforth called a province, is capable of a continuous political existence, so as to be able to transmit to its new self any title to legislative authority, although its geographical boundaries, and even its geographical name, remain unaltered. Its political existence,

so far as its legislative capacity is concerned, becomes completely extinct at the moment of its admission—(the executive, administrative and judicial powers being specially kept on foot in the manner and subject to the provisions mentioned in section 129)—and at the very same moment, and by the very act of admission which extinguishes the previous legislative powers, it acquires, under the authority of the British North America Act alone, a new charter as it were of legislative capacity, as to topics regulated, in the main, by sections 92, 93. And every topic and power of legislation which is not, on the whole Act, exclusively vested in the Provincial Legislature, is by section 91 swept within the sole 250 jurisdiction of the Parliament of Canada. Chief Justice Harrison lays this down very clearly in Leprohon's case (40 Upper Canada, page 488) and points out that our constitution is in this respect the converse of the United States. And Spragge, Chanc., (same case on appeal, 2 Ontario, Appendix 522) says: "The Province has only the powers specifically conferred on it; the Dominion has all not specifically conferred on the Local Legislatures." And Savary, County Court Judge, Nova Scotia, in a vigorous judgment cited approvingly by Doutre (Constitut. of Canada, page 56) says: "All which is not expressly or by necessary implication conferred on the Local Government and Legislature resides in the Dominion." To which I would 260 add, that any matter, to fall within the legislative capacity of the Local Legislature, must be given to it not only "expressly," or "specifically" or by "necessary implication" but exclusively; and not by this section or by that, but exclusively, on a comparison of the whole Act. So that if there be any conflict or concurrence of gifts, then inasmuch as the gift (so far as it is concurrent) is not exclusively to the Province, it falls, according to section 91, exclusively to the Dominion.

The next fundamental error I shall notice, which occupied a large part of the argument in support of the widest view of the legislative authority of the Province, was where the Attorney-General endeavored to support it 270 upon the supposed difference between the Local Legislature in a dependency originally acquired by settlement, and a dependency acquired by treaty, or by settlement. And it was said that a dependency acquired by settlement had much larger legislative powers, or more indelible powers, than a dependency acquired by either of the two latter titles; and that British Columbia fell strictly within the first category. I think myself that (if it made any difference) it is arguable that British Columbia and Vancouver Island were not acquired wholly by settlement, apart from treaty; that the treaty of 1846 had a good deal to do both with the foundation of the origi-

nal colony of Vancouver Island (1846), and of the original colony of the 280 Mainland (1858), afterwards united as the colony of British Columbia (1866), which now exists as a province of the Dominion (1871). And the absolute power of legislation placed by the Royal Authority in the hands of Governor Douglas for the first five years of the existence of the Colony (which the Attorney-General much pressed on our attention) looks very much as if British Columbia were treated at that time entirely as a colony by cession, according to Blackstone's view (1 Stephen Blackstone, 99). But into this question it seems quite useless to enter; neither do I enquire whether the Attorney-General's proposition is anywhere true. It seems to be too clear for argument that whatever the nature or derivation of the Local Legislatures 290 previously and up to the 20th July, 1871, those Local Legislatures became, as has been said, completely extinct on the admission of British Columbia into the Dominion, and that all the present provincial Legislatures now have precisely the same authority within their respective geographical limits, viz.: that given to them by the British North America Act, and no other authority; and that, not by transmission or inheritance, but solely and entirely by virtue of the Act. But the contention seems no less singular than erroneous; and I think it would not, for instance, meet with much favor in the Province of Quebec.

It was also strenuously maintained that the Supreme Court of British 300 Columbia (under its various successive titles) from 1858 up to the moment of Confederation was wholly organized, maintained and constituted by Colonial authority, and it was especially contended that it was "organized" by Colonial authority alone. As to this last point it is to some extent a question of definition: what is meant by "organization?" If issuing a commission and nominating every Judge in either Vancouver Island or British Columbia up to the time of Confederation, enter at all into the notion of "organizing" the Court, then, certainly, the Supreme Court of British Columbia from 1858 to the time of Confederation was not wholly "organized" by the then Colony. But the consideration of this question 310 again seems to me entirely immaterial. What is material, and what cannot be denied, is, that at and up to the moment of Confederation a Supreme Court of British Columbia existed in the then Colony, completely organized, maintained and constituted; possessed of all the jurisdiction, power and authorities which had been possessed either by the previous Supreme Court on the Mainland, or by the previous Supreme Court of Civil Justice of Vancouver Island: possessed also of all the additional powers mentioned in the last constituting ordinance previous to Confeder-

ation, viz., the British Columbia ordinance of 1869 (confirmed by an ordinance of 1870.) And all this before the "Province," in its technical sense, had at all come into existence. This I do consider extremely important. Combined with other circumstances, I think that it places the Court at once under the Dominion Parliament, and removes it from the authority of the Local Legislature, by virtue of section 129 of the British North America Act. 320

By far the larger portion of the Attorney General's suggestions was taken up by the fallacies just pointed out, and which I need not further refer to.

The bare question before us is, whether section 28 of the Act of 1881, so far as it forbids any sitting of the full Court oftener than once a year, 330 and so far as it authorizes the Executive Council to fix the time of sitting, is constitutional. But in order to support this section it became pretty evident that it was necessary to include a good deal more; and the Attorney General claimed an "omnipotent" authority over the Judges of the Supreme Court and the Court itself, and over the procedure in that Court by virtue of this "omnipotent" authority. The Judges were to be, nominated and sent into the Province by the Governor General as officers purely of the Province, the servants, I had well nigh said the slaves, of the Legislature and Executive of the Province, to live wherever the Executive might appoint each from time to time to live, to do what the Legislature 340 might appoint each from time to time to do. The only thing that the Local Legislature could not do to a man while he was a Judge of the Supreme Court was to pay him; that is by the British North America Act reserved wholly to the Dominion authority.

But I think that such claims are altogether too extensive, even if they do not totally fail; and that on the true construction of the British North America Act, the Judges are responsible to the Dominion authority alone, who alone may vary or repeal the powers with which the Court was invested at the time of Confederation; and in particular (what is in fact the matter at issue) that the power of regulating whatever falls strictly within 350 the meaning of the term "procedure" in the Supreme Court here, remains where it was before Confederation, viz: in the hands of the Supreme Court itself, subject to legislation in a constitutional way by the Parliament of Canada under section 129 of the British North America Act.

The attention of the Judges has been called to the various opinions expressed by them in August and September, 1880, with regard to the first

Order in Council, 16th July, 1880, purporting to establish rules of Court under section 17 of the Judicature Act, 1879, viz.: the case of *Saunders v. Reed*, before myself; *Harvey v. Corporation of New Westminster*, before Mr. Justice Crease; and *Pamphlet v. Irving*, before Mr. Justice 360 Gray, with the view of showing that we all three then affirmed the legality of the power arrogated by the executive to make rules; and that we cannot without self contradiction now deny that power. Now, in fact, that point never came up for decision at all in any of the three cases. I do not mean to say that it was denied, but neither was it affirmed. It was never raised by the suitors. All the Judges were much puzzled as to the effect of that first Order in Council (published in *Gazette*, 17th July, 1880.) It came first before myself, and I changed my mind about it more than once. In order to clear my views I placed them in writing. At first I inclined to think that the Order in Council was quite unmeaning, and so 370 established no rules at all here, in which case, under section 19 of the Act of 1879, the old practice would have remained; but I finally concluded that the Order in Council had established some rules capable of being proved in evidence, but requiring such extraneous proof, and therefore they prevented me from conducting business in Chambers according to the former practice, without informing me what practice was substituted, reducing matters to a deadlock, removable only by evidence in every case brought forward. My statement or memorandum of arguments in support of my first views got into print, I do not know how. The report, of course, reads absurdly, for the arguments in it are directly at variance 380 with the conclusion. But there never was any question raised in that case as to the validity of section 17, (1879), nor as to the authority of the Executive to make the Order in Council, 16th July; that was assumed and acquiesced in by all parties. The next Judge, whose opinion was taken, was Mr. Justice Crease, 6th August. He seems to have come to the same conclusion as myself; and there also, the power of the Executive seems to have been acquiesced in without ever being called in question. Lastly, *Pamphlet v. Irving* was brought on before my brother Gray. He decided according to the view I had at first inclined to, viz.: that the Order in Council, 16th July, was so utterly dark and obscure as to be a 390 nullity, and therefore that it did not prevent the continuance of the old practice in Chambers. But in none of these cases was the power of the Executive to make rules of procedure, which depends on the authority of the Local Legislature to invest it with such powers, called in question; nor did any of the Judges, nor could they, give any binding opinion at all whether the authority existed or not; and I do not choose to inquire

into the reasons for now publishing unauthorized reports of those cases with quite inaccurate headings. It is, perhaps, more important for the Attorney General's argument to observe, that on the ensuing 16th October another Order in Council was made, cancelling the Order of the 16th July, 400 and declaring a whole body of rules to be in force as from the 15th November following, called "The Supreme Court Rules, 1880"; and that these rules, never having had their authority tested by any suitor, have ever since from time to time construed and suffered to be applied by all the Judges, who in this way may seem to have acquiesced in the legality of the authority or authorities under which these rules were issued. But up to this time no decision has ever been given, nor could have been given, either one way or the other on that point. None has ever been requested. The question of their legality is now raised for the first time.

The position of a Judge is a very helpless one, especially in British 410 Columbia. He cannot state his opinions except in judgments from the Bench. These are seldom heard, except by the parties interested; once delivered, all the reasoning, everything but the dry result is forgotten or imperfectly remembered: often misunderstood, and unintentionally misrepresented at the time, almost certain to meet that fate in the near future. And in matters not brought before a Judge for actual decision, he is more helpless still. All he can do in sight of legislation, however objectionable it may appear, is to lay a statement of his views before the Ministry. That communication may be considered strictly confidential; the receipt of it is acknowledged with or without thanks, and the document is pigeon-holed. 420 A Judge cannot, consistently with his own self-respect, descend to whisper his doubts into the ears of litigants, or send a brief to the leader of the Opposition in the Legislature. He cannot write leading articles in newspapers, though Lord Cairns, C. B. Kelly and Lord Penzance did once each, and only once, I believe, write a letter to the *Times*. But with respect to the power reserved to the Executive in section 17 of the Judicature Act, 1879, since the Attorney General has relied upon our apparent acquiescence in its legality, it might be worth while to give the real history of that Act. But it may suffice to say that at every stage of the bill in its passage through the House, we warned the Attorney General, with all the energy at our 430 command, of the more than doubtful constitutionality of two sections, viz: section 14 and section 17, both of which, we urged, would be certainly challenged at some time or other. These two sections, however, the Government insisted on retaining, without condescending to offer any argument or explanation. How just the apprehensions of the Judges were, may

appear from this, that section 14 probably gave rise to the McLean case, and section 17 has given rise to the present discussion. It is rather too much for even judicial endurance that we should now be taunted with having acquiesced in the legality of the authority thus assumed by the Executive. We have on every legitimate occasion expressed the gravest doubts con- 440 cerning it.

The fact is that all through the year, 1880, we conceived the intention of the Executive to be to work out the Judicature Act, 1879, in a useful and proper way, upon the plan which we suggested to the Government, and almost exactly as we should have done ourselves, viz: following as closely and literally as possible the lines of the English rules; the "Supreme Court Rules, 1880," being little less than a transcript of the English rules, with geographical modifications. And, possibly, if the power rightly or wrongly assumed by the local Legislature had been exercised in a way useful, or at least not intolerable to the suitors, no question would even now 450 have been raised as to the legality of their assumptions. But at the very end of 1880, two other Acts, "The Better Administration of Justice Act, 1878," and the "Judicial District Act, 1879," came into operation. Against both of these Acts, the Judges had made strong protests, on the ground of unconstitutionality in some of their chief provisions; but both of them had been left to their operation by the Dominion Ministry. That, of course, cannot give them any validity which they do not otherwise possess. The direct effect of these Acts was to split up the Supreme Court into four District Courts, to be conducted each before a Judge of the Supreme Court, banishable into remote districts, and removable from one district to the 460 other at the dictation of the local Executive: exactly the contrary policy to that of the Judicature Act, 1879. And they cast upon the Supreme Court Judges, as an obligation, all the duties of the County Court Judges—all whose judicial duties we had from time to time assumed when necessary, in our discretion under the Ordinance of 1867 (passed before Confederation.) But indirectly these Acts did much more. By virtue of the "Mining Act, 1873," the Supreme Court Judge in each district would have to perform all the duties of a Gold Commissioner, including the duty of collecting petty fees and payments, and accounting for the same to the Provincial Treasurer. For it seems clear that if the Local Legislature can arbitrarily impose on a 470 Supreme Court Judge the duties of a County Court Judge, it can with equal autocracy impose, and has imposed, on a County Court Judge the duty of a Gold Commissioner; and if it can do this, I do not see why it has not equal authority to impose on a Supreme Court Judge any other duty in

the Province, judicial or ministerial. By the "Minerals Act, 1878," it has equally imposed on every Supreme Court Judge in British Columbia (for gold mining is carried on in every "Judicial District") the duty of holding mining Courts daily throughout the year (Sundays and holidays excepted.) All these Acts or results seem logically to stand or fall together. If any one be constitutional they seem to be all constitutional, and to carry with them 480 the above conclusions. But against these conclusions, or some of them, every Judge now on the Bench has protested, and flatly refused to obey. And the introduction of such laws here has compelled the Judges to look more closely than they were previously inclined to look into the authority for these usurpations.

Up to the year 1880, the constitutionality of Statutes made by derivative legislatures had been but little considered, at least in the British Courts of Justice; nor had it much engaged the attention of British text writers. But Leprohon's case in 1880, Valin *vs.* Langlois in 1880 and 1881, Regina *vs.* Burah in 1879, Todd on Colonial Parliamentary Government, and Doutre 490 (both published 1880), and Cooley's Constitutional Limitations (4th edition 1880, the first which was brought to our notice) could not escape our attention; and compelled us, even had there been nothing unusual in the local statutes here, to consider their validity in the light of these quite modern discussions. I should be ashamed to admit that these authorities have not enabled me to see more clearly distinctions which up to 1880 I had never been called upon to formulate and define. But I may say that ever since 1872 I have more or less closely expressed similar views, nor have I stood alone. For instance, ever since 1876 the Judges of the Supreme Court here have insisted upon the two main positions on which Valin *vs.* Langlois and 500 Leprohon *vs.* City of Ottawa were afterwards determined, and that in the most practical way; we rejected the demands of the Provincial tax-gatherer when he endeavored to levy income-tax on our judicial salaries; and we took among other grounds the following: 1st. That we were Dominion officials (afterwards so implied, necessarily, in Valin *vs.* Langlois.) 2nd. That the local Legislature had no power to tax Dominion salaries (afterwards so held in Leprohon's case.) And though the tax-gatherer twice, or thrice I think, repeated his demands, the Government never attempted to enforce them. This, however, was only a passive resistance, though very clear, and acquiesced in. Again, if I may refer to a matter entirely personal 510 to myself, when I had occasion to apply for leave of absence in 1874, I applied to the Dominion Government, as being a Dominion officer; sending my application, of course, through the hands of the local Executive. And

though that was opposed by the local Executive, who insisted that they alone had the power to grant or refuse leave, and declined to forward my application, and although, in order to save time, I complied with their wishes on that occasion, yet I felt bound to offer apologetic explanations (which were graciously accepted) to the Dominion authorities at Ottawa; and my view was upheld there, and the local Executive were informed to that effect; and now, when a Judge desires leave, he applies to the Dominion authorities alone. Of course, they receive and consider any report which the local Executive may think proper to make as to the local convenience of the leave; but the Dominion alone grants or refuses leave. How can they have this power, if the Judge is a purely Provincial officer? So that the local Executive is not without notice of the views expressed to-day. Still, if it had been merely the Judges who were personally inconvenienced by recent legislation, matters might never have come to an issue. But what has brought this question at length into serious argument and necessitated the expression of a judicial opinion by us is the recent Act of the local Legislature, by which suitors are debarred from having any *nisi prius* decision reviewed except at intervals of a whole year. And in the examination of the question whether such a denial, or at least delay, of justice is within the competence of the local legislature, principals must be laid down which no doubt deal with an important portion of the local legislation here within the past few years.

Mr. Justice Cooley in his treatise on Constitutional Limitations (page 195) says: "A judge conscious of the fallibility of human judgment, will shrink from exercising this power of declaring an act of the legislature void, in any case in which he can, conscientiously and with a due regard to his duty and official oath, decline the responsibility. * * * 540 "But when courts are required to enforce the law as it stands on two statutes, one local, the other paramount, they must enforce the latter whenever the local law comes into conflict with it." Elsewhere he says that "the jurisdiction is only to be undertaken with reluctance, and will be left for consideration until a case arises which cannot be disposed of without considering it, and when consequently a decision on the point becomes unavoidable." (page 199). But when it becomes necessary to decide on the unconstitutionality the court cannot refuse to do so.

Mr. Justice Cooley's treatise did not reach Victoria until a year ago, but this extract describes very accurately the course which this Court has 550 actually pursued since April, 1879.

Having therefore noticed the greater part of the views press upon dues by the Attorney-General, which in our opinion were not very important to be considered at all, and which we dismiss as not touching the real point at issue, we turn to examine the constitutionality of the impeached sections by the only test to which we can apply, viz: the British North America Act, the "paramount statute," to use Mr. Justice Cooley's words; and the only questions we can entertain are those stated by Lord Selborne in *Regina vs. Burah*, 3 Privy Council appeal cases, page 905, viz.: "Is this thing "which has been done legislation? Is it within the general scope of the "words which affirmatively give the power? Does it violate any express 560 "condition or restriction in the creating Act (or in any other Imperial Act) "by which that power is limited?" I think these questions should be answered unfavorably for the constitutionality of the sections now impeached. The rule is stated to much the same effect by Mr. Justice Cooley (Constitutional Limitations, page 204.)

The impeached sections are sections 28 and 32 of the local Act, 1881, chapter 1; section 28 is as follows:

"The Judges of the Superior Court shall have power to sit together in the City of Victoria as a full court, and any three shall constitute a quorum, "and such full court shall be held only once in each year, at such time as 570 "may be fixed by Rules of Court."

And section 32 runs thus, so far as is material:

"The Supreme Court Rules, 1880, shall, as modified by this Act, be valid * * and the Lieut.-Governor in Council shall have power to vary, amend or rescind any of these rules or make new rules, provided the same are not inconsistent with this Act, for the purpose of carrying out the scope and aim of this Act and of the 'Better Administration of Justice Act, 1878.' These rules need not be uniform but may vary as to different districts in the Province as circumstances may require. And section 17 of the Judicature Act, 1879, with respect to Rules of Court shall continue 580 "to be in force, subject to such proviso."

(Section 17 of the Act of 1879 directs all Rules of Court to be made by Order in Council).

These sections must stand or fall as they agree or disagree with the British North America Act, 1867. I do not know whether the Act, 1881, chapter 1, has been disallowed at Ottawa or whether it has been left to its

operation. It is quite clear that if originally unconstitutional it cannot be in any degree confirmed by being left to its operation, which merely means the absence of any formal condemnation by the Governor-General's constitutional legal advisers.

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I shall endeavor to show: 1st, that these sections deal with a matter, and in a manner, that is not either expressly or by reasonable implication, affirmatively placed within the power of the local Legislature. This I think can be established without going beyond section 92 and its sub-sections. But if we look at the rest of the British North America Act, I think it will also clearly appear: 2nd, that the impeached sections infringe the plain words of other sections of the British North America Act and are repugnant to its manifest intentions.

The only part of the British North America Act, so far as I can see, which can warrant the recent local legislation is to be found in section 92 600 and two of its sub-sections.

Section 92 is in these words: "In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated, viz.:

"Sub-section 13. Property and civil rights.

"Sub-section 14. The administration of Justice in the Province, including the constitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including also Civil procedure in those Courts."

It must throughout be borne in mind that by the immediately preceding section, 91, every topic of legislation was swept into the power—the exclusive power—of the Parliament of Canada (viz.: the Crown, the Senate and Commons of Canada) except only such matters as by this Act—not by any one section of, but by the whole Act—are exclusively assigned to the local Legislatures. If, therefore, a conflict arises between any general words in section 92, and general words in any other part of the Act, or between express words in section 92, and express words in any other part of the Act, so that any matter which might otherwise have been supposed to be included in the terms of section 92 or its sub-sections, is also equally placed under Dominion control in some other 620 part of the Act, and thus not given exclusively to the Province, then by virtue of the sweeping force of the words in section 91 the Parliament of Canada has sole cognizance of such matter. For it would be contrary to

common sense to suppose that the extremely careful framers of this British North America Act intended to permit a joint authority in two entirely differently constituted bodies (the Parliament of Canada being composed of the Queen, Senate and House of Commons of the whole Dominion, and the local Legislature, consisting merely of the Lieut.-Governor and local House of Assembly), and that, too, at the very moment when they were taking pains to distinguish and separate them. 630 And the express words of the second branch of section 91 shows that when any authority is conferred on the Dominion Legislature, it was intended to be an exclusive authority. We must also bear in mind that the matters enumerated in the sub-sections of section 91 are not to be looked upon as limiting the power of Parliament ; and that, on the other hand, all the sub-sections in section 92 (so far as they are exclusive) are exceptions out of the otherwise universal grant to the Parliament of Canada in the first part of section 91.

The first thing to be observed upon section 92 is, that its object and intention as well as express phraseology is to confer a legislative power on 640 a legislative body. The words of sub-section 13 and the first part of sub-section 14 are extremely comprehensive. If they stood alone ; if "civil rights and the administration of Justice" were handed over to be dealt with by any one department of the Provincial Government, the grant would cover everything that can be done by any of the three branches of civil government, the legislative, the judiciary, and the executive. But the sub-sections do not stand alone ; nor do they contain any words of grant. They are entirely governed and controlled by the operative words in the body of the section ; and merely enumerate the topics upon which the grant is to be exercised. And the grant is to a purely legislative body, of purely legislative functions, "to make laws" in relation to civil rights and the administration of justice ; and there is no grant here to the local Legislature enabling them to exercise either judicial or executive powers or functions in respect of any of the enumerated topics. 650

In defining, asserting, ascertaining and protecting civil rights,—in administering justice, the share of the Legislature is probably the most important. But the Legislature has only a share in the work. A very important share in all this business belongs to the judiciary ; a very important share to the executive alone ; and it could not have been intended to give to the Legislature power to perform both judicial and executive 660 functions ; and at all events it has not been expressly given. No part of the administration of justice, probably, is more important than the safe

custody of alleged criminals and the punishment of persons convicted. For these purposes the Legislature have authority to legislate—to provide that prisons shall be built and constables appointed. But they cannot carry out their own commands; they cannot contract for the building of a lock-up, or appoint a constable, or determine whether an accused person is guilty or whether a constable does his duty. These matters are clearly left to the Executive and to the Courts. The gift of power to legislate in relation to the administration of justice, therefore does not give to a legislature power 670 to interfere in every particular involved in that subject; but only in those particulars which are the proper subjects of legislation. This may, perhaps, be made a little clearer by supposing a converse case. Suppose that the Courts of Justice in each Province were by the British North America Act charged expressly (as they are indeed most clearly charged impliedly) with the care of civil rights and the administration of justice, would it for a moment be contended that that authorized them to *legislate* in reference to civil rights or the administration of justice? And still less would such a power be implied if they were directed to render all such judgments and exercise all judicial authority as may be required for the maintenance of 680 civil rights and in reference to the administration of justice. Nothing but judicial powers would be conferred thereby on the Courts. And so, I think, nothing but essentially legislative functions are conferred by section 92, which grants to a legislative body power "to make laws" in relation to civil rights and the administration of justice. There might be somewhat to be said against this view if it reduced section 92 to a barren grant; if there were nothing left upon which the grant could operate. But this is by no means the case. The argument leaves to the local Legislature, fully and unimpaired, all essentially legislative functions in respect to all the matters enumerated in section 92; all matters of substantive law; all, surely, 690 that could have been intended to be given to the Legislature of the Province. The management of public lands and works, a large part of taxation, the whole law of inheritance to real and personal property, the rights of creditors against the person and property of their debtors, of husband and wife, the law of juries and attorneys and numberless other matters are left to the local Legislature; executive and judicial functions, however, are not given, and therefore are expressly forbidden to them, even in regard to these topics

The necessity, especially in a constitutional Government, of distinguishing between the functions of the Legislature, of the Executive and 700 of the Judiciary, requires no comment. It is a necessity indeed which

may be said only to exist in a constitutional Government; for if these functions be allowed to be usurped by any one branch, the Government will cease to be constitutional, and will be in reality a despotism; whether vested in a Louis XIV., in a Venetian Council of Ten, or in a Long Parliament. And this may be one of the meanings of Lord Burleigh's apothegm, "That England can never be ruined but by a parliament." "Public liberty," says Blackstone (2 Stephen Blackstone, 493) cannot subsist long in any State unless the administration of common justice be in "some degree separated both from the Legislative and the Executive power." 710 And Chief Justice Harrison in his luminous judgment in Leprohon's case insists on the importance of preserving the distinction (40 Upper Canada, 487).

As to the line of demarcation between the Legislature and the Executive it has been well observed by a distinguished writer (Doutre, Constitution Canada, page 104) that "in a constitutional Government the Executive is merely the committee of management of the majority in parliament." Differences of opinion, therefore, as to whether any particular exercise of authority belongs of right purely to the legislature or purely to the executive are not very likely to arise. And if any act of either should be called in question by the minority, as an encroachment on the other, the majority 720 in parliament will generally sustain the action of their own committee, or be sustained by them, as the case may be. And this is especially probable in a single chamber constitution. But it is not necessary here to inquire into the boundaries between the functions of the legislature and of the executive. We shall endeavor, however, to distinguish to some extent the functions of the Legislature and of the Judiciary, and in the first place consider the subject of procedure, which, in the case of a Superior Court, is generally allowed to be under the control of that Court. But then, what is procedure? what is not?

It is clear that a Court of Justice ought not, under color of regulating 730 practice, or procedure, either to make a new law, or repeal an old law, affecting a suitor's rights in anything which may be the subject matter of a suit. But the forms, and the times, and the proofs to be observed and adduced in claiming those rights are matters for the Court to determine unless the power be taken away. These constitute, I think, what may be called the procedure of the Court. Even such a matter as the limitation of actions in point of time is part of the *modus procedendi* (Story's Conflict of Laws, page 577, section 99, and the authorities there quoted). So is evidence (Taylor's Evidence, section 41). And as to moulding the commencement of actions, that was so completely in the hands of the Courts, that 740

each had its own forms of writs; and it was in order to bring about uniformity of practice that the Imperial Parliament from time to time interfered in all these matters, as it had a right to do by virtue of its sovereign authority. But no legislature not everywhere sovereign can interfere with or alter the procedure in a Superior Court unless special authority to do so be conferred on it by the Sovereign, *i.e.*, here, by the Imperial Parliament. This power of Superior Courts is, I think, undoubted. It is called a common law right (3 Chitty's Statutes 505, and the authorities there quoted, and *re Story* 8 Exch. Rep. 198). When the Imperial Parliament has intervened, it has generally been cautious not to cast doubt upon the power of the Court (as in the Common Law Procedure Act, 1852, chapter 76, section 223, *sub finem*). But this leaves the question still open, whether any particular matter is matter of procedure, or of substantive right or law.

The question was very clearly raised and discussed, but not, I think, decided, in *Poyser v. Minors*, (7 L. R. App. Cases, page 331). There the proper quorum of County Court Judges had established, as a rule of County Court procedure, Rule 9 of the Schedule to the Judicature Act, 1873, (giving a very stringent effect to all judgments of non-suit). The majority of the Court of Appeal gave effect to that rule of Court, treating it as concerning a matter of procedure merely. Lord Justice Bramwell 760 dissented, thinking that this was a matter of substantive law, and so not within the competency of a quorum of County Court Judges to establish. The actual decision in *Poyser v. Minors* could perhaps be supported in either view. If the rule there discussed were matter of procedure, then the County Court Judges had power to establish it. If it were substantive law, then being in fact a provision of the schedule of the Imperial Judicature Act, 1873, which by section 60 is part of the Act, it became by section 91 binding on all County Courts as well as on the High Court, whether they adopted it by general order or not. The majority of the Court in *Poyser v. Minors*, and Lord Justice Bramwell himself in *Palles v. Neptune Insurance Company* (5 C. P. D. 39), however, clearly expressed the opinion that the phraseology in the Judicature Acts of 1873 and 1875 amounts to a legislative declaration that all the topics treated of in those schedules are matters of pure procedure, and on that account, within the cognizance of the Judges to regulate.

“‘Practice,’ in its larger sense,” says the lamented Lord Justice Lush in delivering the judgment of the Court in *Poyser v. Minors* (page 333), “the sense in which it was obviously used in the Act of 1856, like ‘procedure’ which is used in the Judicature Acts, denotes the mode of pro-

ceeding by which a legal right is enforced, as distinguished from the law which gives or defines the right, and which, by means of the proceeding, the Court is to administer; the machinery, as distinguished from the product." If it be lawful for me to put a gloss on the words of that distinguished Judge, I should be inclined to say that the "Rules of Court" with which we more immediately have to deal, do not even mean the machinery, but are merely directions for using the machinery, including announcements by the managers of the department of the times at which the machinery may be employed. The orders and rules under the Judicature Acts 1873, 1875, are matters of procedure, and are not intended to alter the law or the rights of parties, says Lord Justice Bramwell delivering the judgment of the Court of Appeal in *Palles v. Neptune Ins. Co.*, (5 C. P. D., see page 41.) The words "legal right," used by Lord Justice Lush, and "law," and "rights of parties," used by Lord Justice Bramwell, mean clearly what Lord Justice Lush terms a "product," something quite different from the "right" which every suitor has to the benefit of the "machinery," or of the directions for using the machinery; though, owing to the poverty of language, the same word "right" may be applied in both cases. And it seems clear that it is only the "product" mentioned by Lord Justice Lush which comes within the meaning of section 92 of the British North America Act, and which alone the Local Legislature has power to deal with. If we had now to decide that point we should probably follow those Judges. But it is not necessary to go quite so far. The only point actually arising for decision is as to the alleged restriction in section 28 on the sitting of a full Court for a whole year, and the attempt to give to the local Executive authority to appoint our sittings. It is more important to observe that what the Imperial Parliament has done is no sure test of what a local Legislature may do, and that not even the Imperial Parliament has ever meddled with the point of procedure now in question, viz.: the fixing the days or intervals of holding full Courts, or as they are termed in the English Statutes, Divisional Courts, for the review of *nisi prius* decisions. That has always been left to the discretion of the Judges to fix from time to time according to the requirements of the suitors and the state of other business before the Courts. And accordingly it is notorious that such announcements are made from the Bench from day to day as occasion requires. No legislature, nor any other body than the Judiciary, actually engaged in the conduct of business, can arrange such matters with tolerable propriety or convenience to the public.

Whatever may be said of some topics, this, at all events, is pure procedure, and essentially of Judicial cognizance. It is not a legislative function at all, any more than the adjournment of a part-heard case. It consequently is not included in any general gift of legislative power. And, therefore, it is not conferred by the gift to a legislative body of "a power to make laws in reference to civil rights and the administration of justice." And not being within the power of the legislature to deal with it themselves, they cannot transmit any authority in that behalf to any other body, apart from the doctrine in *Regina v. Burah*, which I shall examine presently. If the Imperial Parliament may and does from time to time thus interfere beyond its proper legislative functions, that is by its virtue of its universal sovereignty, no derivative legislature may do so unless especially 820 authorized in that behalf. Mr. Justice Comstock says: "Aside from the special limitations of the Constitution" (*i. e.*, in our case the British North America Act), "the legislature cannot exercise powers which are in their nature essentially executive or judicial" "We are only at liberty" says Cooley, "to liken the power of State Legislatures to that of the Imperial Parliament when they confine their action to the exercise of legislative powers; and such authority as is in its nature either judicial or executive, is beyond their constitutional power" (pages 108, 110)—unless, I would add, authority to overstep ordinary legislative limits be expressly given in and by the creating Statute. Cooley is 830 speaking of the States Legislatures, who have received, he says, certain powers from their Sovereign, the people; but his remarks are, I think, exactly applicable to the Provincial Legislatures created by the British North America Act, who have received certain powers from their Sovereign, the Queen in Parliament. And he says that a grant of legislative authority, though as plenary as that of the Imperial Parliament while exercised on matters essentially of legislation, does not enable the Local Legislature to extend its hand into matters properly judicial, although the Imperial Parliament might do so, and might by express words have authorized them to do so, if it had seemed proper. The Imperial Par- 840 liament, in its absolute sovereignty, can neglect at will fundamental principles. Further on he says, page 211: "When only legislative power is given to one department and only judicial power to another, it becomes quite unimportant that the legislature is not expressly forbidden to try causes, or the judiciary to make laws. The assumption of judicial functions by the legislature is in such case unconstitutional even though not expressly forbidden; for it is inconsistent with the provisions which have conferred on another department the powers

which the (Local) Legislature is seeking to exercise." It must be admitted that section 92 confers expressly nothing other than legislative 860 powers. The words are clear: a "power to make laws;" and nothing else.

But if this view be as far wrong as it seems to me to be clearly right; if the appointment of the days for holding a full Court be a matter of substantive law, and so requires to be determined by a legislative body, and if that body so entrusted by the British North America Act be the Local Legislature, then the determination of it is an act of pure legislation, which the sections now impeached attempt to hand over to another body, 870 viz.: to the Lieut -Governor in Council. And this according to the *dicta* in *Regina v. Burah* is clearly beyond the limits of their powers. It would be "to create a new legislative power not created nor authorized by" the British North America Act.

That case was very much relied on by the Attorney-General as a complete justification of his attribution of "omnipotence" to the Local Legislature, and he repeatedly cited Lord Selborne's expressions at the foot of page 904 of the report, viz : "But their Lordships are of opinion 880 that the doctrine of the majority of the Court below is erroneous, and that it rests on a mistaken view of the powers of the Judicature and legislature, and indeed of the nature and principles of legislation. The Provincial Legislature has powers expressly limited by the Act of the Imperial Parliament which created it, and it can of course do nothing beyond the limits, which circumscribe these powers. But when acting within these limits it is not in any sense an agent or delegate of the Imperial Parliament, but has and was intended to have plenary powers of legislation as large and of the same nature as those of the Imperial Parliament itself." But these words, in which I perfectly agree, and 890 which would be binding on me even if I could not concur in the reasoning, appear to me to have been completely misunderstood here. They are, in fact, completely conformable with and lend the highest sanction to the principles I shall lay down. But in order to understand the passage, it really must not be cut off from the immediately preceding and succeeding context at the top of the same page and at the top of the next. Lord Selborne after saying (page 904) that the Court below had examined whether the clause there impeached was within the competence of the Indian Legislature on the principle "*delegatus non protest delegare*," says, in the passage just quoted: "That is not at all a principle to apply. A 900 derivative legislature is not a delegate of its creator; but has, within its

limits, as plenary powers as its originator." But then he proceeds immediately to say (page 905): "We quite agree that the Indian Legislature could not by any form of enactment create in India and arm with general legislative authority a new legislative power, not created nor authorized by the Councils Act" (the Imperial Act creating the Indian Legislature)—not on the principle *delegatus, &c.*, but because that power of creating a subsidiary legislature had not been granted by the Imperial Act, and the Indian Legislative committee would have been going beyond their limits if they had attempted to create such a thing. Now that is precisely the case in the British North America Act; it confers on the Local Legislature no power to create a new legislature, nor contemplates legislative powers being handed over to the Lieut.-Governor in Council. And then in page 905, Lord Selborne goes on to say: "Nothing of that kind has in our opinion been done or attempted here," and states what, in the opinion of the Privy Council actually had been done; viz.: the legislation and all its provisions were complete; and a law, pure and simple, was handed over to the Lieut.-Governor to say in what territorial districts of his territory it should be applied, and at what date; as soon as these were fixed, everything else, that could be called legislation, had been fixed and prepared for him beforehand. But it is clear from the expressions in page 905, quoted above, what the opinion of the Privy Council would have been, if the impeached law had handed it over to the Lieut.-Governor to make laws in any district of his presidency, as well as to fix the times and districts in which the laws so to be made by him should come into effect. This was the only question raised and decided in *Regina v. Burah*. The effect of the other sections of the impeached Statute was not called in question (page 895, page 903) nor taken into their Lordships' consideration. The Privy Council held that what had been done in this impeached part was merely conditional legislation, not an attempt to create a distinct legislative body. See also the expressions of Chief Justice Hagarty in *Regina v. Hodge* (46 U. C. Q. B., see pages 151, 152.)

As to this first point, therefore, the argument on section 92, sub-sections 13 and 14, taken alone, stands thus: This power of fixing the sittings of the full Court is matter of pure procedure, *i.e.*, of merely judicial cognizance; and, therefore, the Local Legislature has no authority over it at all—it never was given to them. But if that view be held erroneous, and if this power be deemed a matter essentially legislative in its nature, then the Local Legislature must provide for it themselves; they have no authority to create a new legislature to make provision for it. And this latter con-

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clusion might, but for one thing, have been deemed to have been the conclusion of the advisers of the legislature a year ago, when they inserted in that section 32 of the Act of 1881, c. 1., the words confirming and giving a statutory force to all the "Supreme Court rules, 1880." These rules had, theretofore, stood on the authority of the local Executive, claiming to be duly empowered thereto by section 17 of the Act of 1879. It might almost have been conjectured that it was in 1881 suspected by the local Government that this section 17 was *ultra vires*, according to *Regina v. Burah*, were it not that the very same error was committed over again in the very same section ; and even a grosser error, for in that very section 32 the legislature gives power to the Executive not only to make laws (if these rules of 950 Court are laws), but to repeal and alter what has just been decreed to be statutory law. 960

The Attorney-General, however, further insisted that the Supreme Court here fell within the description in the latter part of sub-section 14, viz : "including the constitution, maintenance and organization of "Provincial Courts, both of civil and criminal jurisdiction, and including civil procedure in those Courts," and he claimed under those words full and express authority to deal with civil procedure in all Courts, including the Supreme Court. But it seems as clear as words can speak, that the procedure thus handed over to be provided for (not, I think, to be set forth in 970 detail) by the Local Legislature is the procedure in "those" Courts, viz : in the Courts mentioned in the immediately preceding words, the only Courts mentioned in the whole 92nd section, Provincial Courts, that is to say, in the strictest sense of the term, which the Local Legislature is by that sub-section authorized at any future time to "constitute, maintain and organize," and by sub-section 4 of section 92 is specially empowered to pay. It seems perfectly impossible that this description can mean a Court which was fully constituted, not by the Province at all, but long before the Province came into existence, and having that constitution secured to it by section 129, (British North America 980 Act) till varied by Dominion legislation ; a Court of which the Judges are appointed and maintained and removable by the Dominion authorities alone (sections 96, 99, 100, British North America Act).

The introduction of the latter part of this sub-section 14 does not seem to assist, but greatly militates against, the Attorney-General's contention that the first words alone "power to make laws in relation to the administration of Justice" were intended to confer absolute power over all Courts

in British Columbia, together with their procedure and everything therewith connected. For if such had been the intention of the first grant, nothing can be weaker than to add, "and this grant shall include the constitution, maintenance and organization of Provincial Courts," and then still further to add: "and shall also include civil procedure in those Courts,"—showing that a power "to make laws for constituting, maintaining and organizing Courts" was not thought enough of itself to carry a "power to make laws in reference to procedure" even in those Courts, without special words; and that such an express grant was necessary in order to confer any power to legislate on the procedure even in those inferior Courts. This seems quite incompatible with the Attorney-General's contention, that no express words whatever were necessary to confer absolute power over every point of procedure in the Supreme Court. The section, 1000 so far as sub-sections 13 and 14 are concerned, amounts to this: The Local Legislature may make laws in reference to property and civil rights, and also to the administration of Justice; and those laws may include laws for the constitution, maintenance and organization of Provincial Courts (*i. e.*, Courts of the Province after Confederation); and may include provisions in reference to civil procedure in the Courts so constituted, maintained and organized." In fact it seems clear that the Courts here contemplated must be subordinate to the Supreme Court. Otherwise, if of co-equal authority, they would be, at the least, Superior Courts, and so by sections 96, 99 and 100 the Judges would have to be appointed and maintained and removed when necessary by the Dominion alone; which, according to the views of the Judges in *Valin v Langlois*, (3 Canada S. C. R. 1) would make them officers of Canada, and so by the British North America Act itself (section 129) under the control of the Parliament of Canada as to their jurisdiction, procedure and everything else, and not under the Local Legislature; which is contrary to the hypothesis, and absurd. These Courts, therefore, contemplated in the latter part of sub-section 14 are inferior Courts, including most probably all such Courts as Courts of Justices of the Peace, Coroners, Gold Commissioners, Sheriffs' Courts, etc. And it may well be supposed that when such local Courts 1020 suggested themselves to the framers of the British North America Act as possible, the question arose, "what is to be done about procedure in these "Courts? In Superior Courts, the Judges, we know, have power to make "rules; but in these Courts, who shall settle their practice?" and Parliament said "let the Local Legislature decide that."

The case would stand thus, therefore, on the bare words of section 92, sub-sections 13 and 14, and without considering Lord Selborne's second test, "Is there anything in the rest of the British North America Act incompatible with the evidence of this power in the Local Legislature?" And the answer to this is, I think, not far to seek. It is not only extremely clear on the Act itself, but has in effect been judicially settled by the ultimate authority in Canada, approved by the Judicial Committee of the Privy Council.

The steps leading to this conclusion are these: By section 96 the Judges are to be appointed by the Governor-General. By section 99 they are removable by the same authority, on the address of the Senate and House of Commons. By section 100 they are wholly maintained by the Parliament of Canada. The Province has no voice in any of these matters. How can it be said that the Judges are exclusively Provincial officers? 1040 And if not exclusively Provincial, then they are officers of Canada. "If an officer is employed by the United States," says Chief Justice Marshall, "he is an officer of the United States." (*United States v. Maurice*, 2 Brock, see page 102). The Governor-General directly represents and, so to speak, personates the Queen. The Lieut.-Governor, from whom strictly Provincial appointments emanate, only represents the Governor-General. The effect of the appointments is different accordingly. Surely the Judges of the Supreme Courts, selected, commissioned and paid, and removable by Canada, are employed by Canada, and so, officers of Canada. On that very ground the Province has abandoned their claim to tax our incomes; and 1050 the Dominion Executive have instructed the Provincial Executive that they alone claim the right of disposing of the Judges' services, as by imposing other duties; and to temporarily dispense with their services, as by granting them leave of absence. These matters are not conclusive evidence of the meaning of the Act; but they are very cogent evidence; deliberate opinions of high Executive authority; repeatedly made by the Dominion, and submitted to by the Province; and what is most important, judicially approved (so far as the question arose) in *Valin v. Langlois*. In fact, but for the course of British Columbia legislation for the last 3 or 4 years, every authority, both of the Dominion and of the Province, would seem to have 1060 been entirely of one mind ever since 1874, that the Judges of the Supreme Court in any Province are Dominion officials. The consequences are not far off. By section 129 (upon the importance of which in this argument the Judges rely in *Valin v. Langlois*). "All laws in force in Canada, Nova Scotia or New Brunswick at the Union, and all legal commissions, powers

and authorities and all officers, judicial, executive and ministerial, existing therein at the Union, shall continue in Ontario, Quebec, Nova Scotia and New Brunswick, respectively, as if the Union had not been made, subject nevertheless.....to be repealed, abolished or altered by the Parliament of Canada, or by the Legislature of the respective Province according to the authority of the Parliament or of that Legislature under this 1070 Act."

Now it is perfectly undoubted that the Supreme Court of British Columbia, and two of its present Judges existed in the Colony of British Columbia at the time of the Union. They, therefore, continued to exist in the Province since the Union; and so do their commissions, their powers and authorities as if the Union had not been made. The change of name from "Canada" to "Quebec" and "Ontario" in the above sections is suggestive. It is not that the former Provincial Courts, Judges, etc., in the old sense of "Provincial" are to become "Provincial" in the new sense. On the contrary, the former Courts and Judges with all the 1080 powers and jurisdiction over all matters, both in section 91 and section 92, in short, as they existed in the completely autonomous provinces, are to be continued after the Union in the same geographical limits, though they are now called "provinces" in quite a different sense. All the Judges appointed since Confederation are by their commissions expressly to have all the powers and privileges of the other Judges. Among the powers and authorities which the Judges undoubtedly had under the British Columbia ordinance of 1869, confirmed by the British Columbia ordinance of 1870, are all the powers and authorities (which as to rules of procedure are extremely full) of the former Courts of Vancouver Island and 1090 of the Mainland, and of the Judges thereof (1869 Merger Act, section 11). And besides this, the Act of 1869 gives authority to the Chief Justice alone "from time to time to make all such orders, rules and regulations as he "shall think fit for the proper administration of justice in the said Supreme "Court of Britith Columbia." And this is confirmed, as I have said, by an ordinance of the ensuing year, immediately before Confederation. All these powers and authorities the section 129 preserves inviolate, until abolished, repealed or altered by the Dominion Legislature or the Provincial Legislature, according as either shall have authority under the British North America Act. But the Judges are Dominion officers, over whom the Dominion 1100 Executive and Parliament have between them, by sections 96, 99 and 100, the fullest authority, and over whom the Provincial Executive and Legislature have no authority at all, discoverable by the Judges in *Valin v. Lang-*

lois. The powers and authorities, therefore, by the British Columbia Colonial Ordinance of 1869 remain intact at this day, subject to the powers by section 129 expressly reserved to the Dominion Parliament.

I do not think it can be argued, at any rate it was not argued, that the distributive words at the end of section 129 have reference to the subjects handled by the Courts, officers, &c., and not to the Courts, officers, &c., 1110 themselves. In the first place, the words of the statute are perfectly plain, and contain no reference to any particular topics, the passive subjects, *i. e.*, enumerated in sections 91 and 92, but only to persons and their powers, active agents, owing allegiance to the one legislature or the other. And when construed of such, it is perfectly reasonable and clear. If it be attempted to be applied to the enumerated topics in section 91 and section 92, it leads instantly to quite absurd confusion. It would provide, for instance, that the Dominion Parliament alone had power to legislate concerning the procedure in trying a question in the Supreme Court here concerning the post office, or shipping, or currency, or any of the matters in section 1120 91, or rather, not expressly mentioned in section 92; but that in trying a question on any of the subjects enumerated in section 92, the Provincial Legislature is to have power to determine the procedure. And we should probably have the Dominion Parliament enacting (if it thought fit to legislate on such a topic) that a full court might consist of two Judges, and should sit whenever required by the business of the suitors, and on such notice as it should think proper; and the Provincial Legislature declaring that it must consist of three judges or more, and must not sit oftener than once in a year, or, as was put in argument, once in five years, and at a time appointed by the Executive. Nay, we should have greater confusion still, 1130 and indeed, absolute contradiction. For as the Legislature having authority may under section 129 go so far as to abolish these former courts, it is clear that if we are to ascertain the respective authority by reference to the enumerated topics in sections 91 and 92 we might have the Dominion Legislature keeping this Court on foot for determining all questions of bankruptcy, currency, &c., and the Local Legislature abolishing it so far as regards all questions of inheritance, of legitimacy, or of civil rights generally. And the Local Legislature are to have power to do all this, though they are to have no voice in the removal of a single Judge (section 99.) It is, in my opinion, improper to force the words of a statute out of their natural meaning with the sole result of introducing confusion and contradiction. Moreover we must not forget the clear words of section 91. Whatever is not exclusively given to the Province, falls wholly to the Dominion. And even

according to the forced view of the latter part of section 129, which I have been endeavoring to indicate, it is at all events quite clear that power over the Supreme Court and procedure therein would not thereby be exclusively given to the Province. Therefore, by section 91, it is exclusively given to the Dominion Legislature.

And with this view agrees also section 130, which is to be taken in connection with the concluding words of section 129, which it immediately follows, being in *pari materia*, and, I think, intended to explain them : 1150
 "Until the Parliament of Canada otherwise provides, all officers of the "several provinces," [i.e., before Confederation] "having duties to discharge "in relation to matters other than those coming within the classes of sub- "jects assigned exclusively to the legislatures of the Provinces" [after Con- federation] "shall be officers of Canada, and shall continue to discharge the "duties of their respective offices as if the Union had not been made."

The Attorney-General treated this clause very briefly, dismissing it as quite irrelevant, though I think even if it stood alone, it would suffice to dispose of the whole case. He said, as well as I could follow him, that it was intended to apply only to officers after Confederation whose duties were 1160 confined exclusively to matters outside of sub-section 92, 93. But it is evident that this is not the natural meaning which would be put by a person of ordinary understanding on section 130. And an Act of Parliament *loquitur ad vuegus*. In fact, in order to support this meaning some word like "merely" or "solely" must be introduced, and the tenses employed entirely disregarded. "Having duties" means properly "now having," i.e., at the time of passing the Act, though it might mean "who shall at any time have." But the terminating words "shall continue as if the "union had not been made" shows clearly that the section is speaking of officers existing before the union, i.e. in the "Provinces" while still auto- 1170 nomous, and therefore of officers who might well have duties over many matters both in section 91, and also in section 92. As to these officers a difficulty, it was foreseen, might well be felt, whether they were to fall under the authority of the Dominion Parliament or of the Local Legislature, under the distributive words at the close of section 129. Thereupon this section 130, following naturally on the last words of the previous section, is obviously intended to meet that difficulty and explain the position of these officers with dual duties. They shall be officers of Canada. The construction suggested by the Attorney-General, besides the objections pointed out, would lead to this consequence, that the framers of this treaty of Con- 1180

federation, as it is not improperly termed, thought it worth while to provide for a case which was perfectly clear, and omitted to provide for a difficulty which must have been immediately present to their minds; indeed, forced on them by the concluding words of section 129. There could be no difficulty, in the case of officers whose duties were purely of Dominion cognizance, though locally dwelling and working in a Province. In some Province they must dwell, and work, if they were to dwell and work in Canada at all. The only difficulty that could arise was in the case of officers whose duties partly concerned Canada generally, partly the Province (the statutable Province) alone. This, however, according to the Attorney-General escape the notice of the negotiators and they introduced a merely useless proviso. Useless, even for the Attorney-General's argument; for on no possible construction can it be supposed that section 130 hands over any officer at all to the Local Legislature, which is the proposition he has to establish. This proviso, section 130, even as the Attorney-General reads it, certainly gives to the Province no exclusive power over any officer or thing whatever.

There is indeed a short sub-section in section 92 which the Attorney-General did not think it necessary to discuss, but which seems wholly irreconcileable with his position that the Supreme Court Judges are merely Provincial officers. I mean the 4th sub-section. "The Local Legislature shall have power to make laws in relation to the establishment and tenure of Provincial officers, and the appointment and payment of Provincial offices." But by the almost immediately following sections of the British North America Act, it is the Dominion authorities which have to appoint, remove and pay the Judges of the Superior Courts. If these Judges are Provincial officers, it seems to follow that notwithstanding the words of the sub-section 4, the care (and the duty) of legislating concerning the salaries, etc, of Provincial officers is not, on the whole Act, exclusively reserved to the Local Legislature. And without going so far as to say that that care and duty (including provision for the salary of the Attorney-General himself), is therefore wholly cast upon the Dominion Parliament and Government, it seems clear that we should have here, in almost consecutive sections, a very remarkable contradiction if the Act intends "Provincial officers" to include Judges of Superior Courts. A similar incongruity, though not leading so directly to a *reductio ad absurdum*, arises on sub-section 8 of section 91, reserving it to the Dominion Parliament exclusively to provide for fixing and paying the salaries of all Dominion officers; surely intending by that term to include the Judges who are spoken of four or five

sections further on. There certainly is no express power reserved to the Dominion Parliament to legislate for providing the salary of any Provincial 1230 officer, *eo nomine*. In fact, if the Judges of the Superior Courts are taken to be purely Provincial officers, every section of the Act referring either to Provincial or Dominion officers, has to be forced, and becomes anomalous. If held to be Dominion officers, the construction immediately becomes natural and harmonious.

All these five sections, viz.: 96, 99, 100, 129, 130, are evidently founded on a fundamental principle of the British North America Act; (viz.) that while local legislation, properly so called, *i.e.* concerning strictly local matters and rights, was to be handed over absolutely to the respective Provinces, all authority over matters of general importance to 1240 the Dominion was to be retained by the Dominion Legislature. And in order to safeguard these objects, and ensure that this division of functions should be observed, all the Superior, District and County Courts in every province after Confederation, (*i. e.*), in the whole Dominion, were to be presided over by officers of Canada, and to be subject to the control of the legislature and executive in Canada,—Courts inferior to these, if created by the Local Legislature in any Province, being left to be dealt with by the Legislatures which called them into existence.

And with this seems also to agree section 94, which provides that “after the passing by Parliament of an Act for Uniformity and civil rights, 1250 “etc., and procedure throughout the Dominion” (confirmed and adopted by the Provinces as therein mentioned) “the power of Parliament to make “laws in respect of such matters shall be unrestricted.” That is to say, not that Parliament shall then for the first time have power, but that the existing restrictions shall then for the first time be removed. There seems to be as I read the British North America Act, one restriction on the interference of Parliament, and only one, (viz.) section 129, confining it to Courts held before officers of Canada; and section 94 seems to allude to this. I do not say that this is the only possible grammatical sense of section 94, but this interpretation supports and is supported by many other sections of the Act, 1260 whereas any other interpretations seem to raise anomalies. For the language of section 94 and of many other sections seems hardly compatible with the notion that until the passing of such an Act as therein referred to, Parliament is to have no power whatever to legislate concerning a single Court in the whole Dominion; and that by simply refusing consent to any contemplated Act, any province could for ever condemn the Dominion Parliament to perpetual impotency. This would soon compel Parliament to

exercise its undoubted power of extinguishing all the Superior Courts in the Dominion by simply leaving them to perish ; and then it would fall back, probably, on the power of creating new courts under section 101 ; but 1270 whether these would meet the difficulty, *quære*.

There was one suggestion made by the Attorney-General which I had almost forgotten. It appears to me to be very immaterial ; but as he insisted on it at some length, I may mention some of my reasons for neglecting it. It was that the "organization and maintenance" of a court meant something more than the appointment and payment of the Judge or Judges of the Court ; that it included among other things the appointment and maintenance of all the officers of the Court, registrars, etc., the providing court-houses, chambers, etc., preparations for trials of crimes, juries, etc., all which are now provided by the Province and at Provincial expense ; and thus, 1280 that the Supreme Court of British Columbia has never, since Confederation, been wholly organized or maintained by the Dominion, who have undertaken merely the nomination and the salaries and allowances of the Judges. I am very much of the Attorney-General's opinion as to one part of his suggestion. I have always thought that the Registrars and officers were part of the Supreme Court, and ought to be designated and maintained by the Dominion authorities alone, both on the words of the British North America Act and on the policy of the thing. I have often pressed my views on the Dominion Government, ever since 1872, and I have never been satisfied that my arguments were met by any attempt at argument on the construction of 1290 the Act. I was not likely therefore to have omitted this consideration. But it does not seem to govern the present question. Whether the expenses of the Supreme Court of British Columbia are, in the fullest sense of the word "Courts," wholly defrayed by the Dominion or not, it cannot be said that it is a Court, "constituted, maintained and organized" by the province within sub-section 14. The consideration that the Registrar has hitherto been paid by the Province cannot affect the position that the Judges at least are, according to the reasoning in *Valin and Langlois*, officers in Canada, and subject as such to the authority of the Parliament of Canada, and therefore to that Parliament alone, for they cannot be subject to two 1300 different legislatures at once. It cannot affect the direct and express provisions of section 129, that all the powers and authorities which the Judges (who at all events are "judicial officers") had before Confederation, are to continue after Confederation, until altered by the Parliament of Canada ; nor those of section 130, that we are to "continue to discharge our duties as if the union had not been made."

These are the principal matters which have suggested themselves to me in considering the recent Acts of the Local Legislature. Some of the points on which I have ventured to rely are, I have been told, new ; not put forward in any of the text books or reported cases ; indeed, rather 3010 opposed by the dicta in some report ; e. g. : 1st. The proper force now for the first time claimed for the word "those," in sub-section 14 of section 92. (2nd.) The force claimed for the word "exclusive" in section 91, and that the exclusive grant to the province must appear from the whole Act, not from any particular section. (3rd.) The restriction of the grant in section 92 to strictly legislative functions, so that no grant to the local legislatures is thereby conveyed or intended to be conveyed of functions essentially executive or judicial. (4th.) The application of Lord Selborne's *dieta in R. vs. Burah* in this way, that if the clauses now impeached deal with a matter essentially judicial, they are not at all within the powers of the local 3020 legislature ; if essentially legislative, the power cannot be transferred. (5th.) The application of the "exclusive grant" notion to the concluding words of section 129, so that if the Dominion Parliament have thereby any power, the Local Legislature have none. (6th.) The distinction I have endeavored to draw between the different senses in which the words "Province," "Provincial," are used, and other instances, perhaps. But the question is not whether these distinctions are new, but whether they are true ; and I think they are ; that they quite accord with the principles of the decision of the Supreme Court in *Valin vs. Langlois*, (3 Canada Supreme Court R. I.), and may even, I venture to hope, explain away some carpings and anomalies 3030 which have been objected against that decision.

We were reminded that we could not condemn these sections as unconstitutional, merely because we thought them inexpedient ; that the question of policy was wholly for the legislature. That is undoubtedly so ; if the local legislature have the power, they alone must judge of the policy. But I cannot refrain from pointing out that recent legislation seems to aim not at the administration but at the non-administration of justice, and affords a clear proof of the wisdom of the framers of the British North America Act when they removed these matters, as I think it has removed them, from the control of the Local Legislature. The effect of the whole scheme is such, that 3040 if the Judges of the Supreme Court had of their own mere motion announced the resolution to do what the recent legislation authorizes, and in some respects, attempts to command ; if we had taken up our residences, one in Queen Charlotte Island, another at Joseph's Prairie, a third on the Semilkameen and the other two at Kamloops and Richfield, and further an-

nounced that we would not listen to suitors seeking a review of a *nisi prius* decision, save at intervals of twelve months, it seems highly probable that the indignant and injured suitors might readily have procured addresses from the Senate and House of Commons to remove us from offices, the duties of which it might truly be said we had practically renounced. Not, however, 3050 on account of this unreasonableness, nor because it contradicts the text of Magna Charta (an Imperial Act); but for the reasons I have alleged, I think that the provision in section 28 of 1881, chapter 1, forbidding a Full Court to be held save at intervals of a year; and section 32, chapter 1, 1881, and section 17, 1879, chapter 20, so far as they assume to create rules of procedure in the Supreme Court, or to authorize any other body of men to make such rules, are unconstitutional and void.

Mr. Theodore Davie for the plaintiffs contended that the whole of additional rules of Court, the so-called "Amendments," must be condemned, on this ground: They are founded, in the main, and almost in every detail 3060 also, on the words and spirit of section 32 of the Act, 1881, viz., with the paramount object as expressed in that section, of carrying out the Local Statutes of 1878 and 1879 with reference to the districting of the Judges of the Supreme Court. That those Acts are all *in pari materia* with the Acts of 1881, c. 1, and therefore must be read together: (Waterlow *vs.* Dobson 27 L. J. Q. B. 55, and see. 2 App. Ca. L. R. 762), that they are eminently and flagrantly unconstitutional; and that these "amendments," made avowedly in order to carry out unconstitutional Acts, an object to which the rights of the Dominion and the convenience of private suitors are alike sacrificed, must be declared to be of no effect. Mr. Theodore Davie further urged 3070 that an Act of the Local Legislature may be declared void, judicially, not only for direct conflict with or transgressions of the British North America Act, but for any obvious repugnancy to or hindrance of its intention; according to the observations of C. J. Harrison in 40 U. C. 488, and Hawkins *vs.* Gathercole (1 Deg. M. and G. 1). And, without in the least disputing the power of the Local Legislature to divide the Province into such districts as they may think fit (the term "district" since Confederation seems unimportant) and to appoint and maintain in each district such Judge or Judges as they may choose, and who may be able and willing to serve (persons under other engagements would probably require in the first place the sanction of their 3080 employers) and to confer on their new courts such jurisdiction as they pleased (subject always to the review of the Supreme Court) it is of course obvious that there are many grounds on which divers clauses of the "Judicial Districts Acts" may be impeached. They may be said to be

directly in the teeth of section 129. Can anything, it may be asked, be more clear and express than section 96 of the British North America Act,—“The Governor General shall appoint the Judges of the Superior “District and County Courts in each Province?” Can anything be a clearer infraction of that provision than section 3 of the Local Act, 1878, which says that after that Act comes into force, the existing County Court Judges 3090 shall no longer preside in the County Courts, and that certain other designated persons shall perform all the duties of the County Court Judge?

“An office,” says C. J. Marshall, cited approvingly by C. J. Harrison (40 U. C. 491), “is a public charge or employment. He who performs the duties of the office is an officer. If employed by the United States he is an officer of the United States.” It may well be argued, that if the Local Legislature can, notwithstanding the above section, arbitrarily forbid any one class of the officers there mentioned to perform the duties of his office, and command such person as they may choose to perform these duties, they may equally 3100 displace and appoint substitutes for them all, including the Supreme Court Judges. If these assumptions are legal, it would seem, as the Attorney-General alleged, that the Local Legislature is really omnipotent; and it is difficult to see why it should not with equal authority depose the Lieutenant Governor and appoint some other person to perform his duties. It is true, by sections 58, 59 and 60 of the British North America Act, the Lieutenant Governor in each Province is to be appointed by the Governor General, removable by the Governor General, and paid by the Parliament of Canada. But these are precisely the authorities who appoint, remove and pay the Judges of the Superior, District and County Courts in each 3110 Province (District Courts in these sections mean courts constituted before Confederation). Indeed it might be argued that the position of the Lieutenant Governor was weaker than that of the Judges of Supreme or County Courts, for these are protected against the efforts of the Local Legislature by a special clause, section 129, whereas the Lieutenant Governor (the office being previously unknown) has no such protection. Then as to the indirect unconstitutionality of these Acts, from their intention, and effect, Mr. Davie’s argument was, if possible, stronger. The suitors have a right to the attention and care of all the Judges, in the consideration of the laws, whether made by the Dominion or by the Local Legislature. The isolation 3120 of two or more Judges in distant localities where they never can have any opportunities of hearing or entering upon any legal argument not only tends to depreciate their judicial power by non-user (Lord Eldon used to say that no man was so good a lawyer at the end of the long vacation as he

was at the beginning of it) but to deprive their colleagues also of the inestimable advantage of full and confidential discussion ; and so tends to disable the whole Bench. For every Judge in turn may be thus banished. It deprives the suitors of the advantage of having their cases decided by the absentees. We are even now deprived of the presence of our colleague, Mr. Justice McCreight. Indeed, if there were any difference of opinion 3130 between the Judges now in Victoria, that absence would have rendered further delay necessary, as we certainly should not deliver a judgment of this importance by a bare majority, or perhaps, by no real majority. The Acts enable the executive to select which Judge shall try, or shall not try, particular criminals or disputes. For the Acts do not contemplate, apparently, the permanent residence of any one Judge in any one place, but the removal of them at the arbitrary dictation of the Local Executive, whenever and wherever they may deem necessary. Coke says that the criminal shall not be allowed to select which of several Judges shall try them ; it seems conversely that neither should the Crown enjoy that 3140 privilege. But the main reason, on grounds of policy, would seem to be that it aims the most direct and scarcely veiled blow at the independence of the Judges. No Judge can tell what new district may be created, or how soon he may be arbitrarily directed to reside at McDame's Creek or Parsley River. It is in vain to say that the selection both of the Judge and of the district is now to be made by the Dominion Executive. They know the Judges merely by name, the districts perhaps not even by name, and must act solely on the information of the Local Executive, who would thus acquire complete power to pack the Bench as they pleased, and obtain what decisions might suit them. Inde- 3150 pendent minded men would not accept or retain their appointments on such terms, and subservient men alone might occupy the seat of judgment in those parts of the Province where suits were likely to occur. It may well be argued, and it was argued, without any answer being attempted, that a grant of power to the Executive (with apparently a Parliamentary direction to use it) to lay down wholly varying rules of practice in different parts of the Province* with the express object of carrying out acts *prima facie* unconstitutional, for the avowed purpose of directing the conduct of non-existing courts, and with the result, palpable and obvious, of impeding and, in fact, preventing access to an existing court, must be for 3160 those grounds alone unconstitutional. And perhaps those grounds would be sufficient if, after argument, we should determine that they were well

*See 32nd sec., quoted ante p. 12.

taken. As these arguments were raised I notice them. I give no opinion upon them, because I think the sole point before me may be quite satisfactorily decided in the answer to these questions: 1st, Are the sections 28 and 32 of the Act of 1881 (so far as they go to restrain the sitting of a Full Court and to authorize the Lieutenant-Governor in Council to appoint the time of the sitting of a Full Court) authorized by the British North America Act? And secondly, do the "Amendments" (I assume them to be issued in the proper form of an Order in Council) contain rules and regulations 3170 binding on the court or on the suitors? And I am of opinion that the impeached sections and amendments are invalid on both those grounds; that there are no words in the Act which confer on the Local Legislature the power it has assumed; and that there are several clauses in the Act which designate other authorities as being invested with that power. The consequence is, I think, those sections are unconstitutional and void, so far as they enact or provide for the enactment of rules of procedure in the Supreme Court, and the so-called "Amendments" must fall with them. We shall immediately consider what steps should be taken for the relief of the suitors in this difficulty. 3180

Before delivering judgment *Mr. JUSTICE CREASE* remarked that as the Judges had prepared their judgments separately, and he had now for the first time heard or seen that of the Chief Justice, it would not be surprising that his own observations should run partly over the same ground. He then proceeded to render the following judgment:—

CREASE, J.—

In forming a judgment upon a case argued at such length and with so many authorities upon matters which are of such grave importance—not only to one province, but to the whole Dominion—it is necessary as much as possible to narrow and define the issues that have to be authoritatively 3190 determined by our decision. For that purpose it is advisable to clear off as may usefully be done all points and subjects of a preliminary nature, that we may address ourselves to the task immediately before us, forming a judgment, whether we can hear the appellants? and how? We have to render a decision in the case. That will be found an enquiry of engrossing interest. In considering these points we are not at liberty to follow the plan which the learned Attorney-General, having no connection with the Thrasher case, and intervening only as *amicus curiae* at the suggestion of the Court, and himself unfettered, was enabled to adopt; but we have to recollect that our office in the first instance is to determine if 3200

possible the case before us. To give the relief sought, or failing that, to point to the best means available for procuring a proper hearing for the appellants before a suitable tribunal; with an ultimate view to a final appeal to the Supreme Court of Canada, perhaps even to the Privy Council at home.

The point which first presents itself for determination is:—

Are we a full Court under *Rule 404 A* of the "*Amendments to the Supreme Court Rules, 1880*," which prescribes that "Sittings of the full Court shall "be held in Victoria for the year 1881 on Monday, the 19th day of December,"—and able thereunder to dispose of the Thrasher case so as to enable 3210 the parties dissatisfied to appeal to a higher Court?

If we are not a full Court under that assumed authority, are we, or can we become able, as a full Court of the Supreme Court in any other way to give the relief sought? If so, it will be our duty to give it.

The considerations and reasonings which will be absolutely necessary to enable us to reach such an end, will also of necessity oblige us to deal with the fundamental principles that underlie the whole case.

These will compel us to consider also the points raised by Mr. Theodore Davie, for our course must of necessity be dictated by the case before us, and proceed in an inverse order to the argument of the Attorney-General, and in doing so to consider as including all Mr. Theodore Davie's points several vital questions in connection with— 3220

(1.) The authority of the Lieutenant-Governor in Council to make the "amendments" in question.

(2.) That of the Local Legislature to delegate the power.

(3.) That of the Local Legislature to make such rules of procedure themselves and legislate thereon direct.

And as an integral part of the same system of Supreme Court legislation referred to us by the plaintiff in this case and raised in *Regina vs. Vieux Violand*:— 3230

(4.) The powers claimed by the Local Legislature to break up the residential unity of the Judges by distributing them about to reside in distant parts of the province.

The first matter which has to be discussed is that last advanced by the Attorney General, viz: the allegation that by three judgments, one by each of the three Judges now here, viz: *Saunders vs. Reid Bros.* by the Chief

Justice,—Harvey *vs.* the Corporation of New Westminster by myself—and Pamphlet *vs.* Irving by Mr. Justice Gray—the immediate question before us was already settled; for that each Judge had authoritatively acknowledged that the Lieutenant-Governor in Council was the only proper 3240 authority to make Rules of Procedure for the Supreme Court. Two out of the three were shown to be inaccurate versions of what was decided and the reasons; and I regret that I have had no opportunity of comparing my own judgment with what purported to be a printed copy, as the original has not, that I can learn, been returned. Judges and Courts can not be bound by copies of decisions suddenly sprung on them in a very serious case, and which they have had no previous opportunity of revising. It is an invariable practice for Judges to revise their judgments previous to their being produced as authorized reports. But if, *arguendo*, the alleged copies were all correct, none of them affects to decide the point, as that question was 3250 never raised in either of the cases; but the contention was in the opposite direction, so of course the point could not be judicially decided.

The headings on each alleged copy, which affected to record a decision affirming the power of the Lieutenant-Governor in Council to make rules and regulate what kind of cases shall be appealed to the Supreme Court and what not, were entirely unauthorized.

All that the production of these judgments goes to show is, that each of the three Judges named was endeavoring to find a way out of a deadlock in the administration of justice which the rule-making body had produced, and at last succeeded in doing so. The points now raised have, therefore, 3260 still to be decided.

Reluctant as all Judges are, by education and habit, and the conservative nature of their daily avocation, to enter into delicate constitutional questions, or to shake the stability of either legislative or judicial institutions (the breath of whose life, the sole secret of whose power for good, is the implicit confidence and trust they inspire) they are especially so when there may be a possibility of being themselves considered to be personally interested in the result of the investigation. When, however, unless they do so Justice is barred, duty steps in and compels them to undertake the task. The cases in the books shew that there is no escape then from a 3270 decision, even if it be only to open the door for an appeal.

The points raised by Counsel in the Thrasher case has been sent back to the Judges here from the Supreme Court of Canada at Ottawa expressly for the purpose of obtaining our opinions on the question. Without our

giving a decision the appellants would be debarred from obtaining justice. By our rendering a judgment in the premises either party aggrieved there may appeal the same to the Supreme Court at Ottawa ; if still discontented there, take the question to the Privy Council in England.

There was also another matter, though of very secondary interest or importance, and not in any way necessary in the determination of any of 3280 the points raised ; but alluded to by the learned Attorney-General in his argument, which deserves a passing notice. He quoted an incidental allusion in the judgment of the Supreme Court in the McLean case to an early proclamation clothing the British Columbia Court with Queen's Bench powers. He stated as the result of his enquiries that nothing could be found but the rough draft of it and one fair copy ; no second or amended copy signed. No correspondence with the Colonial Office as usual on such occasions, or any notice of publication in any Gazette that he could discover, and the presumption, therefore, was, he contended, against its existence, for a secret law even if signed, would not be valid. 3290

That is not the conclusion at which I have arrived ; my conviction is very different. For in 1858-1859, being then the first and only practising barrister in Vancouver Island and British Columbia, and then entirely independent of the Government, I was engaged against the Crown to defend the prisoner in *Regina vs. Neil*, the first murder case in British Columbia set for trial at Langley. I was then authoritatively informed in answer to enquiry as to the Constitution and Criminal jurisdiction of Mr. Justice Begbie's Court that it had (for how long was not stated) all the powers and jurisdiction of the Court of Queen's Bench. This, also, came out in Court before the learned Judge, who drew it for Governor Douglas and Mr. 3300 Solicitor-General Pearkes, who prosecuted for the Crown at the trial : and the value of the special verdict rendered by the jury after a hot contest (in which an American ex-Judge took a very leading part) was tested before it on the following day as a Court of Queen's Bench and judgment rendered thereon accordingly. Had there been any doubt at the time it would have been my duty as prisoner's counsel with a verdict equivalent to wilful murder against him to have demurred to the jurisdiction or used any legitimate means to procure some remission of the sentence necessarily anticipated. The non-discovery of the proclamation and the absence of notice of proclamation—often of the slightest kind—and when there were no news- 3310 papers in British Columbia, and the absence of the correspondence is not surprising considering the disorganized state of the early records. The

lapse of so many (over twenty) years acquiescence, and the fact that it was entirely superseded only a few months later by another proclamation giving the Court the amplest powers,—these considerations quite account for its non-appearance now. There are several acts of Vancouver Island and proclamations of the Mainland similarly circumstanced, yet always dealt with as acts and on the ordinary legal presumptions in such cases, deemed *rite acta* too. Its only interest now is as a historical incident connected with the first trial for murder in British Columbia.

3320

The historical account which the Attorney-General gave of what he considered to have been the early constitutional history of the Island and the Main, until they formed the present united Colony of British Columbia, was not without its interest to me, although unable myself to regard it in the same light or draw from it the same conclusions as himself. As I regarded it, it was impossible not to feel that there was force in a remark which that learned gentleman made; that in the convictions he entertained on that subject he was either very right or very wrong. With all respect I am not prepared to dispute that position. Another preliminary point, although somewhat out of its proper order here, must 3330 be noticed. The same learned Counsel, to whom we are indebted for presenting to us one of the sides of the argument, was anxious to impress on our minds that this Supreme Court, which is the acknowledged heir of all the powers and privileges of all the previous Supreme Courts of British Columbia, is not one of Imperial descent, but was constituted solely by and in the Colony. Now setting aside the Royal Commission of the Chief Justice under Her Majesty's own hand and signet, and my own appointment by Warrant under the same Royal hand and seal, the present Court, and each of the Judges thereof, is direct heir of the Supreme Court of Vancouver Island and its Judges. The learned Attorney-General entirely 3340 omitted to mention that this was a Court created and appointed direct under an Act of the Imperial Parliament, the 12th and 13th Victoria (1849), an Act to provide for the administration of justice in Vancouver Island, and that this occurred before it became a Colony properly so-called, and years before it had a Local Legislature capable of taking advantage of section 2 or of dealing with the constitution of its Courts, and in fact it did not do so. Indeed, it is a question if it ever was in its origin a legally constituted Legislature, although it had acted as such for years. Under that Act, 12 and 13 Victoria, and the Order of the Queen in Council of the 4th April, 1856. The Supreme Court of Civil Justice of Vancouver Island was 3350 created direct from England. Mr. David Cameron by the Queen's Com-

mission was created Chief Justice, and after him Sir Joseph Needham, until the union of the two Colonies into one, when all the Courts and their several jurisdictions, authorities and privileges were combined and handed down to the present Supreme Court of British Columbia. Sir Matthew Baillie Begbie became the sole Chief Justice; myself the Puisne Judge. Now, this Order-in-Council under the Act gave the said Supreme Court "full authority from time to time by any Rules or Orders of Court to be by "them (sic) from time to time for that purpose made shall seem meet to frame, "constitute and establish such Rules, Orders and Regulations as shall seem 3360 "to meet touching and concerning the time and place of holding the said "Court, and touching the forms and manner of proceedings to be observed "in the said Court and the practice and pleadings, upon all actions, suits "and other matters, indictments and information to be brought therein." Bail, witnesses, evidence, admission of barristers and attorneys, sheriffs, lunatics, Probate, all costs and fees of Court and its officers, and in fact "all "other matters and things necessary for the proper conduct and dispatch "of business in the said Court." "And all such Rules and forms of prac- "tice, process and proceedings were to be framed in reference to the cor- "responding Rules and Forms in use in Her Majesty's Supreme Courts of 3370 "Law and Equity at Westminster," subject to the Governor's approval. The same order under the special powers gave also by a separate clause generally "to the said Supreme Court full power, authority and jurisdiction "to apply, judge and determine upon, and according to the laws then or "thereafter in force within Her Majesty's said Colony." Chief Justice Cameron's Commission and Jurisdiction were very full; and covered all matters whatsoever, Civil and Criminal. A reference to the Act and Order in Council will shew that the powers of the Court and the Judge thereof were as ample as could be made. And these were sent out ready made direct from the Imperial Government, so that that Court was not consti- 3380 tuted by the Colony and *a fortiori* by a subordinate province of a Colony. And in the consideration of that Act the construction of law is in favor of the present Court.

For if there be anything more advantageous to it from the Vancouver Island Court, to whom it is heir, being of more direct Imperial constitution under this Act than under any others, then this Court and its Judges are entitled to the benefit of that advantage under the judgment of Jessel M. R. in the case of "*The Ettrick 6, L. R. Probate 134*, where on a question, as to which of two Acts affecting the same subject matter should apply,—the Thames Conservancy Act of a General Act, the learned Judge says: "The 3390 "answer is that the powers given by Thames Conservancy Act are so much

" more advantageous to them that of course they were acting under those powers, and not under the General Act."

In all the period from 1857 up to Confederation, no change whatever could be made in the Courts or the Judges, except with the express consent of the Queen through the Colonial Office first had and obtained; and no attempt was ever made by the Colonial Legislature to deprive the Judges of the power of making Rules and Orders for the regulation of the procedure of the Supreme Courts. Such a thing would never have occurred to them. It was left to a Legislature of far inferior powers to attempt it.

3400

The English Law Proclamation of 1858 introduced such of the Statute Law of England as was not inapplicable, and all the Common Law (if any) as had not been brought in as their natural heritage by the colonists themselves when they settled in the country; and the Supreme Court of Civil Justice of British Columbia recognized and acted on the procedure in Common Law, and in Chancery, extant in 1858, and contained in the Common Law Procedure Acts, which were then new but whose practice had been tested and settled at home. In this and some similar respects the Supreme Courts here were, little as it is imagined in the East, far ahead of some of the chief Courts of older Canada. It is true these Procedure Acts 3410 were improved and amended by the Common Law Procedure Ordinance of the 9th March, 1869. And the Local Legislature, always with the sanction of the Crown and subject to a very active power of revision and disallowance, made various changes in the Courts. But the right of the Judges to make Rules and Orders of practice and procedure was carefully preserved throughout.

The Governor of the Colony had always an immediate and unrestricted power of disallowance and reservation in constant use, and this continued unabated up to 1871, when British Columbia joined the Confederation of the Provinces, which constituted the Dominion. What transpired up to 3420 the Union in the interval between the first establishment of the Supreme Courts and the time when British Columbia joined the Union is, however, scarcely of any great value to the determination of the question which is set before us by the Thrasher Council for solution. Neither is it of any importance to a decision what the high contracting parties before the Union, while the negotiations were going on, would have liked or proposed to do. To us in British Columbia — *penitus toto orbe divisos* — it is given to look with an eye that pays no regard to the inter-provincial divisions, rivalries or distempers existing previous to Confederation, and which that great

measure was intended to cure. No judgment here will be biased either 3430 way by such considerations. We do not ask or care what negotiations took place before Confederation, but what was the effect, where the terms of the contract itself are clear, of the contract of Union itself on British Columbia; and especially its Courts, Judges and Procedure: and that can only be gained by a careful study of the British North America Act itself. It seems strange at this day to be entering into an explanation of such a principle, that negotiations are but the necessary preliminaries to a contract; or that there is no proposition in law more accepted than that the preliminaries to a contract are at once merged in the written contract itself; but the marked reference of the Attorney-General during the argument to speeches of the 3440 great promoters of Confederation makes it necessary. The Act itself, and the terms of Confederation which it embodies, form the contract, the effect of which we have to study.

In this research we should naturally expect to find that the effect of this great constitutional Statute would only become gradually developed, as the circumstances which called for its interpretation should arise, and various legal minds should be brought to bear upon its provisions, from different points of view in different parts of the Dominion. Truth in law as well as other matters is many-sided. And this accordingly we learn to have been the case, from careful inspection of the opinions of various 3450 learned Judges throughout the Dominion on the causes that have from time to time arisen under the Act. The more recent cases of such judgments in *Valin v. Langlois*, *Regina v. Burah*, *Severn v. the Queen* and others, whether in Canada itself or in appeals to the Privy Council in England, seem tending generally, though gradually, to the development of the powers and authority of the Dominion as the necessary outcome of the Federal principle at the base of the Act, and that distribution of power which, whilst religiously observing treaty rights, may one day, though in the perhaps distant future, expand into national life. It is to the British North America Act, 1867, then, and the terms of Union of British Columbia 3460 that we must go to find the solution of our present difficulty.

Here we are met by the consideration, how are we to construe it? On what principle are we to examine and interpret its details? The point to be settled is a legal one. We have to regard it from a strictly legal point of view.

It is this consideration, it is the effort to arrive at this, which has caused the Judges of this Court so much and long anxious thought and deliberation. The whole question has been before them for some time,

and individual opinions have changed and varied, backward and forward, in the arguments in camera, in almost every direction, as the different 3470 authorities which have from time to time presented themselves have prevailed. Until this case arose their anxious aim had been to carry out the wishes of the Legislature as embodied in the Judicature Act, 1879. There were two clauses, however, of this Act to which they had at once felt obliged to officially call the notice of the local Executive and Legislature as fraught with danger; as being, in fact, an interference with the procedure of the Courts in matters criminal and civil—viz.: Section 14—which produced the miscarriage of justice in the first trial of the *Regina v. McLean* and Hare murder case, and section 17, whence arose the present difficulty. This section 17 enabled the Lieutenant-Governor-in- 3480 Council to make Rules and Orders and govern all procedure of the Supreme Court in Court and in Chambers, all forms, witnesses, evidence, duties and rights of Counsel Officers, descending even to costume; following the Judges almost into private life, abolishing the long vacation, providing for rehearing before a full Court of all orders, decrees or judgments of a single Judge, and generally doing anything which, by that or any other Act, might be prescribed to be regulated or done by Rules of Court. These Rules and Orders were to be made entirely exclusively of the only men who for years had studied and had constant experience of the subject—the Judges. Against this extraordinary proceeding the Judges 3490 felt it their duty to protest; and even offered their services to prepare the Rules.

Their protest was contained in a combined dispatch of all the then Judges of the Supreme Court—the Chief Justice, Sir M. B. Begbie, Mr. Justice Crease and Mr. Justice Gray—to the Minister of Justice, and (it being ultimately possibly an Imperial matter), to the Secretary of State. They most respectfully protested against these sections of the Judicature Act, 1879, the Better Administration of Justice Act, 1878, and the Judicial Districts Act, as part of one, and that a vicious and erroneous system. These Acts are inseparable from each other. 3500

They protested against legislation which threatened the disintegration of the Court and the creation of the very complications and difficulties which have at length arisen, with, of course, a proportionate injury to the prestige of the Courts, and the administration of Justice in the Province.

They had recommended, owing to the suddenness of this legislation, the adoption of the English Judicature Rules, so far as not inapplicable to the Province, as an interim measure, preserving the immemorial Com-

mon Law right of the Judges to regulate the procedure of their own Courts by Rules and Orders compiled at a moment of more leisure. The Lieutenant-Governor-in-Council (in other words, the Local Executive) 3510 refused the Judges any voice in the matter, and passed and published the Supreme Court Rules, 1880. As these were almost a literal transcript of the English Judicature Rules, except in some few important particulars, the Judges, true to their desire to aid as much as possible the administration of Justice, raised no immediate questions on the point. If then *ultra vires* of the Executive, and the local Legislature, the alternative was that *prima facie* the power resided in themselves as inherent in them as a Superior Court. (Readen *v.* Mornington, 30 L. J., chan. 663.) And they loyally proceeded to the best of their ability to give them practical effect. When, however, the legislation of unification of the Judicature Act 3520 gave place to that of disintegration in the Administration of Justice Act, 1881, the whole system and administration of Civil Justice became involved in confusion, obscurity and doubt. When Supreme Court Judges were scattered in remote and sparsely inhabited districts of the country (by the Judicial Districts Act, 1879,) where there was no Supreme Court work to do, then (by section 9, Administration Justice Act, 1878) set to do what in Ontario would be Division Court work and with unprofessional practitioners;—required by statute (section 10, Mineral Act, 1881), to hold Gold Commissioner's Court—which legally would mean daily—to collect Gold Commissioner's fee for the local Treasury, settle mining boundaries and then set in 3530 judgment on their own ministerial work;—preside in Mining Courts and discharge Magisterial duties at second hand in appeals on the merits from unprofessional Justices of Peace—leaving the highest class of judicial work for the lower, and any Dominion work entirely in abeyance—a practical *reductio ad absurdum* had been reached which placed them in a state of cruel perplexity. During all this trying period, extending now over some five years, their most urgent representations to both Governments failed to elicit one single legal reason in answer to their respectful protests

But still they went on doing their duty to the best of their ability making the best of the means at their disposal; even using an old voluntary 3540 clause in a B. C. ordinance of 1867 to avoid a deadlock in County Court business throughout the country.

In any other of the Provinces of Canada except British Columbia, legislation which produced such results would not have been possible; or if attempted, would at once have disappeared before the universal opposition and disapprobation it would have elicited;—but the distance of British

Columbia from Canada, the difficulty and delay of communication between places thousands of miles apart, the disinclination of Judges to make complaints, and the still greater disinclination of the recipients to listen to them, the utter disconnection of the Judges from the smallest political 3550 influence to attract a hearing at headquarters—misrepresentations whether unintentional or otherwise, not only of their motives but their most ordinary acts, made their situation and position a very helpless, it might almost have been said a hopeless one.

At length the present case arose. The plaintiffs American merchants of influence were turned over in a case heard before a single Judge of this Court in which nevertheless they conceived the right remained with them.

They were sent direct from this Court under section 6, (although even that I see is not free from doubt) of the Supreme and Exchequer Courts 3560 Amendment Act, to the Supreme Court at Ottawa. That Court, after argument, refusing even to receive the application, sent it back to British Columbia to obtain the decision of Judges in the highest Court, here, before they could be heard in appeal and with a view to a possible ultimate resort to the Privy Council of England. There is no help for it but that the Judges here should address themselves decisively to the solution of the issue placed before them. In this Thrasher case therefore called upon in due form of law, it is their imperative duty to render a decision.

Then for the first time commenced the serious enquiry among the Judges, what were the relative authorities and powers of the local Legisla- 3570 ture, the Lieutenant-Governor-in-Council, and the Supreme Court and its Judges, in respect of the matters before them. Their first duty, the first duty of every Judge, on a legal question being presented for decision, was to satisfy themselves they had jurisdiction to proceed to hear and decide the matters at issue. That depends in this case on the validity of Rule 401 A. That again on the power of the Lieutenant-Governor-in-Council to make the Rules. That, on the power of the local Legislature to delegate it to them; that, in its turn, on the power of the local Legislature to pass laws regulating the Supreme Courts procedure. That, in its turn, also on the construction to be given to the distribution of powers under the British 3580 North America Act among the Provinces and the Dominion. It is therefore to that Act and the terms of Union, no matter from what point of view we commence our investigations, that we are continually brought back to find thereout valid reasons for our decision.

But how then are we to construe it, on what principle are we to proceed to examine and interpret its details from an exclusively legal point of view? The learned Attorney-General argues, quoting the address of Counsel (Mr. Mowat, Q.C.,) when an advocate in the case of *Severn v. the Queen*—Volume II., Canada Supreme Court Rep.:—“that if there “was one point which all parties at Confederation agreed upon” (and 3590 British Columbia, he said, subject to the terms of Union, is in the same position as if it had been one of the original Provinces included in the Act), “it was that all local powers should be left to the Provinces and “that all powers previously possessed by the local Legislatures should be “continued unless expressly repealed by the British North America Act,” adding himself in effect as his own opinion, that the Colony, having before Confederation under Governors legislated freely on the administration of Justice, Procedure, Judges, Courts and civil rights, must be assumed to have retained under the Act the same powers as to the administration of justice as before Confederation. He also contended that in 3600 each Province the Legislature was omnipotent still over Court, Judges and Procedure of all kinds.

It really is not necessary to comment on this argument as the Judgment itself in that very case authoritatively disposes of his position as untenable.

It is very noteworthy, and I confess to my unqualified surprise that throughout the whole argument Mr. Attorney-General Walkem laid no stress whatever, hardly mentioned section 91, which I look upon, and have from the first examination into the Act regarded as the legal keystone of Confederation without which the whole fabric, built up with 3610 such exceeding care, would infallibly, in my humble opinion, crumble to pieces from absolute lack of a power of cohesion. The learned Attorney-General took great exception to a *casual dictum* in my judgment in the murder case *Regina v. The three McLeans and Hare* (page 73) where speaking of the distribution of legislative powers under the Act, and the prerogative power of issuing Commissions of Oyer and Terminer, the following words occur: “I use the word reserved because the very “groundwork and pith of the Constitution Act is that the Dominion is “Dominus. Everything the Colony could give up, consistently with its “Imperial allegiance, was vested absolutely in Canada and re-distributed 3620 “or reserved to Dominion or Province respectively by the provisions of “the British North America Act, and this is a principle of construction,

"the development of which may lead to great issues hereafter, but need not now be further considered." He objected to the use of the words "Dominus" and "redistributed" as inconsistent with the legislative "omnipotence" he claimed for the Province, even while it clashed with Dominion legislation, which he considered it could in Provincial matters override. But though those words were written long ago, before the decisions to which we now have access had reached us, I see no reason for altering that opinion. The only words I would vary would be, per 3630 haps, to substitute the word "merged" for "vested absolutely" in Canada. The phrase "redistributed," however, exactly represents the legal operation which actually took place. The Province had parted with all her rights in order to take some of them again in a different and (except where otherwise specifically prescribed) in a subordinate shape. The right of the Governor-General-in-Council to veto any local Act even when *infra vires* of the local Legislature sufficiently proves that. Of course the word "Dominus" will not be understood to mean that a Province has no exclusive rights of its own except with the consent of the Dominion first had and obtained ; for there are specified in section 92 exclusive powers 3640 given to the local Legislature which include local matters within the Province of great importance ; some concurrently with the Dominion ; but it has to exercise those rights so that they shall not interfere with the general legislation in similar or on the same matters under the exclusive powers expressed or necessarily implied as belonging to the Dominion under section 91—The Dominion under the Act. Therefore, in that sense, I said long ago, and after examination of all the subsequent authorities, in the same sense, I say again, Dominion is *Dominus*.

Courts enter into these Constitutional questions with great reluctance, and although owing, as I have said to recent local legislation, the Judges 3650 here are getting a very severe training in constitutional law incessantly forced upon them, still the study is in its infancy and many and various renderings must from time to time be rendered on all main constitutional questions and even by text writers of such supreme authority as Mr. Alpheus Todd, who has been so much quoted in this case, until by a long course of decisions, the practice shall have settled into a clear and definite system. I can readily imagine the difficulty which even the wisest lawyers would experience at home when questions like the present are for the first time brought before them for final determination ; yet on this very point of supremacy of the Dominion where Federal and Provincial laws conflict, and even 3660 sometimes where they may concur, in my humble opinion depends the stability und ultimate success of this great Confederation.

It is this very section 91, which appears to me to contain the legal germ of development of the Union in the future clearly shadowed forth in the early speeches of Sir John Macdonald referred to and partially quoted out of Doutre's work, page 26 and elsewhere, by the Attorney-General. This section I propose therefore to consider, and see if it bears the construction sought to be put upon it.

In Denton *v.* Daley, tried at Digby, Nova Scotia, County Court Judge, in a clear judgment which Doutre has made his own, says:— 3670

“On the dissolution of the former Provincial Constitutions a new charter “was given to the United Provinces, in which one representative of the “Crown alone, under Her Majesty, rules; new and subordinate govern-“ments being accorded to the different Provinces, composing the Confederation.” In another portion of the judgment the same learned Judge says:—

“Let us now consider the effects of the British North America Act, 1867, “and in view of its provisions and policy there are two propositions which I “may lay down with equal certainty.

“The first is, that the Parliament and Government of the Dominion “constitute the supreme legislative and executive authority, subject only 3680 “to the Imperial Parliament and Sovereign of the Empire. That the former “Provincial Legislatures and Governments were merged in those of the “Dominion, while the newly established local ones are, as it were, carved “out of the latter, and are strictly limited in their powers to such as are “conferred on them by the British North America Act.

“The second is, that unlike the theory of the American Constitution “by which the Parliament of the various sovereign states, or rather the “sovereign people of each state, through their representatives conferred “certain limited and defined powers upon the Federal Government and “Congress, so that every power not expressly thus conferred is supposed 3690 “still to reside in the different states, that unlike this theory, every au-“thority not expressly or by necessary implication conferred upon the “local Government and legislatures by the British America Act, resides “in those of the Dominion.”

In another part of the same judgment, we find the observation:—

“But we do find as a striking indication of where it was intended “that the sovereign legislative and executive power of Canada should “reside, that the Criminal law is a subject of exclusive legislation by the “Dominion Parliament.”

The words of the 91st section are very sweeping:—

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“It shall be lawful for the Queen by and with the advice and consent of the Senate and House of Commons to make laws for the peace, order and good government of Canada in relation to all matters not coming within the class of subjects by this Act assigned exclusively to the Legislatures of the Provinces; and for greater certainty but *not so as to restrict the generality of the foregoing terms of this section*, it is hereby declared that (*notwithstanding anything in this Act*) the exclusive legislative authority of the Parliament of Canada extends to all matters coming within the classes of subjects next hereinafter enumerated (enumerating them, Nos. 1 to 26,) 27, the Criminal law except the constitution of 3710 courts of criminal jurisdiction but including the procedure in criminal matters.”

28. . . .

“29. Such classes of subjects as are expressly excepted in the enumeration of the classes of subjects by this Act assigned exclusively to Legislatures of the Provinces.”

And the Act adds a rider which emphasizes the superior authority of the Dominion Legislature by the last paragraph.

“And any matter coming within any of the classes of subjects enumerated in this section shall not be deemed to come within the class of 3720 matters of a local or private nature comprised in the enumeration of the classes of subjects assigned exclusively to the Legislatures of the Province.”

Lord Carnarvon, in introducing the Bill into the House of Lords, does not ignore the 91st section, but says: “In this, I think, comprised the main theory and constitution of Federal Government: on this depends the practical working of the new system. * * * The real object we have in view is to give to the Central Government those high functions and almost sovereign power, by which general principles and uniformity of legislation may be secured in those questions of 3730 common import to all the Provinces; and at the same time to retain for each Province so ample a measure of municipal liberty and self-government as will allow, and indeed compel them to exercise those local powers which they can exercise with great advantage to the community.”

Surely the administration of justice is a matter in which the Dom-

inion may be expected to have a very strong interest. After commenting on the distribution of powers, Lord Carnarvon adds :

“In closing my observations on the distribution of power, I ought to point out that just as the authority of the Central Parliament will 3740 prevail wherever it may come into conflict with the local Legislatures, so the residue of legislation, if any, unprovided for in the specific classification which I have explained, will belong to the Central body.”

It will be seen under the 91st clause that the classification is not to restrict the generality of the powers previously given to the Central Parliament, and that these powers extend to all laws made “for the peace, order and good government of the Confederation, terms which according to all precedents will, I understand, carry with them an ample measure of legislative authority.” He adds to that effect, that while Dominion Acts are confirmed, disallowed or reserved for Her Majesty’s pleasure by the Governor-General, 3750 Acts of the local Legislature are transmitted only to the Governor-General, and are subject to disallowance within the space of twelve months by him.

Gwynne, J., (*re* Niagara election case, 29 U. C., C. P. 275) distinguishes between the distribution of powers in the Constitution of the United States and Dominion Government as follows :—

“The powers of the General Government are made up of concessions of the several States. Whatever is not expressly given to the former the latter expressly reserve. With us the very opposite of this is the case.

“The Dominion Government and the several Provincial Governments 3760 emanate from the one sovereign power—the Imperial Parliament. The Provincial Legislatures have no jurisdiction whatever but what is expressly conferred upon them by the Statute which calls them into existence. (This is very different from the Attorney-General’s contention.) Whereas by the same statute upon the Dominion Parliament is conferred the power of making laws, not merely in respect of the particular subjects enumerated, but in relation to all matters not coming within the classes of subjects assigned exclusively to the Legislatures of the Province.”

In the case above quoted, *Denton v. Daley*, legislation which it was quite competent for the local Legislature to make, e. g., regulations as to the 3770 retail sale of spirituous drinks, must give way when the Dominion Parliament intervenes in its paramount authority on any subject specially conferred upon it by the British North America Act.

In *Leprohon vs. City of Ottawa*, 2 Ont. App. 522, it was held by an unanimous Court, Spragge, C., Hagarty, Chief Justice, C. P., Burton and Patterson, J. J. A., that a Provincial Legislature has no power under sub-sections 2, 13 and 16 of section 91 of the British North America Act to impose a tax upon the official income of an officer of the Dominion Government. That case further determines that all Government officers as public servants of the Dominion are an essential part of the means and instruments 3780 by which the Government of Canada is carried on, and as such are not objects of taxation by the local Government. The dicta and reasons which led to that conclusion are very instructive in considering the position of the Supreme Court Judges in British Columbia, and the effort to compel them to do many kinds of Provincial duties beyond those of a Supreme Court Judge, and apply even with greater force to occupying their time to the exclusion or limitation of their power to serve the Dominion.

Spragge, C., in that case laid down the dictum that the powers of the Dominion Legislature and of the Provincial Legislature are distributed in classes assigned to each. The Provincial Legislature having only the 3790 powers specifically conferred; the Dominion Legislature having, besides those specifically conferred, all powers not specifically conferred upon the local Legislature.

L'Union St. Jacques de Montréal v. Belisle, 1874, (L. R., 6 P. C., 3) was quoted to show that a Provincial Legislature could interfere and legislate on subjects exclusively given by section 91 to the Dominion, namely, Insolvency; but there the decision turned on the point that the local Act complained of as dealing with insolvency was merely dealing with a local and private association in such a manner as to prevent it from becoming insolvent; and, therefore, as Lord Selborne decided, "to 3800 keep the Act out of the category of the 91st section, and not to bring it into it."

This, therefore, if an authority at all, would be against the Attorney-General, and even the powers of the Dominion Legislature, though so potent under section 91, do not exceed those of the former Colony, and were limited e.g., as regards the Imperial Parliament; for in *Smiles v. Bedford* (1 Ont. App., 436, 1877) it was held by an unanimous Court that under the British North America Act, (section 91, sub-section 23) no greater powers were conferred on the Parliament of the Dominion to deal with the subject than had been previously enjoyed by the local Legislatures. 3810

In *Fredericton City v. the Queen and Baker* (3 Can. S. C., 505),

it was decided that the Canada Temperance Act, 1878, could not be enacted by the local Legislature, there being no express power given to that effect—that power necessarily falls under the control of the Dominion Parliament (by virtue of the sweeping force of section 91). Also, that inasmuch as the right to prohibit any trade has been excluded from, by not being assigned to, the Provincial Legislature, it must necessarily be taken under section 91 to have been delegated to the Federal Government.

The powerful judgment of Mr. Justice Ritchie in this case will repay 3820 perusal, as also in the case of *Regina v. Justices of Kings County*, 2 *Pugs.*, 535, where it was held the local Government had not the power (in the presence of section 91) to prohibit. I have been thus particular in referring to the powers granted and implied in favor of the Dominion Parliament under section 91, because the learned Attorney-General almost ignored it altogether and based the strength of his position on behalf of the local Legislature on the "omnipotent" powers of section 92, and argued throughout that the Provinces went with powers unchanged into Confederation, save as to such specified subjects as they gave up to the Dominion, and that whatever of such previous Provincial powers was 3830 not so specified in section 91, in favor of the Dominion, was retained by the Province. And from that he argued, on the case more immediately before us, that the local Legislature having for a series of years nearly absolute power (subject to the Governor and Imperial authority) over Courts, Judges, Residence, Rules and Orders of Procedure, and everything relating to the administration of Justice within the Province, had exactly the same powers, still after Confederation, except mere criminal Procedure—even to antagonism with the Dominion Parliament itself.

In order to construct such a theory it became necessary to ignore section 91, and the Imperial Vancouver Island Act of 1859, and that the 3840 learned Attorney effectually did. But then what is the value of a legal argument on the British North America Act, which entirely ignores section 91?

We have seen the sweeping character of section 91, let us now see what section 92 contains as bearing on the present case.

It says:—"In each Province the Legislature may exclusively make laws in relation to matters coming within the classes of subjects next hereinafter enumerated."

[Then follows the enumeration sub-sections 1 to 13, which need not be

mentioned here. Suffice it to say that they refer entirely to matters within 3850 the Province.]

“Sub-section 14, Property and civil rights in the province.” Now at first sight this would seem a very sweeping power to give exclusively to the local Legislature, yet read by the light of the whole Act, and the various decisions upon it, bears a very different aspect from that sought to be given to it by the Attorney-General.

Tried by the rule which has been adopted in all similar cases, its exclusiveness and comprehensiveness both nearly disappear. It is the rule adopted in *Fredericton City v. The Queen* as an unerring guide in determining whether any given subject is within the jurisdiction of the Provincial 3860 Legislature or of the Parliament, namely, “all subjects of whatever nature “not exclusively assigned to the local Legislatures are placed under the “supreme control of the Dominion Parliament; and no matter is exclusively “to the local Legislatures unless it be within one of the subjects expressly “enumerated in section 92, and AT THE SAME TIME does not involve any “interference with any of the subjects enumerated in sec. 91.”

The great distinction between sections 91 and 92 is, that while in the former the subjects enumerated are only designed as *examples* of exclusive legislative powers, in the latter the exclusive legislative powers appear to be all enumerated.

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L'Union St. Jacques de Montréal v. Belisle L. R. 6 P. C. 31,—35, and *Dow v. Black*, L. R. 6, P. C. 272,—380.

In *Cowan v. Wright* (23 Grant, Ch. 616) Vice-Chancellor Blake said that the true principle is set forth *in re Goodhue*, “that to the Provincial Legislatures are committed the powers to legislate upon a range of subjects which “is indeed limited, but that within the limits prescribed the right of legislation is absolute.” (This sounds very like the *Queen v. Burah*.) The real question is what are those limits, and that is a chief question in this Thrasher case. That sub-section 13, of section 92, gives the local Legislature exclusive power to legislate on property and civil rights within the province, 3880 without reference to the exclusive powers of the Dominion Parliament, will I expect, be scarcely maintained; and yet the words taken without qualification run so—*Harrison, J.*, in *Parsons v. The Citizen's Insurance Company*, 43 U. C. Q. B. 261, (affirmed by 4 Ont. App.) says:—

“For the powers of the Dominion and Provincial Legislatures we must “refer to the fundamental law on the subject, the British North America

“Act. The only exclusive powers expressly conferred by that Act on the “Provincial Legislatures are those enumerated as in section 92 of that Act.” One of these is the incorporation of companies with provincial objects (sub-section 11), another is “property and civil rights in the Province” (sub. 3890 section 13). The last is “all matters” of a merely local or private nature in the Province, (sub-section 16r). Subject to these and the other powers enumerated in section 92, it is in the power of the Legislature of the Dominion to “make laws for the peace, order, and good Government of Canada.” “No “words in reference to legislation could be more comprehensive than these “words. Examples, however, are given of the exclusive legislative powers “as to different classes of subjects intended to be vested in the Dominion “Parliament by section 91. These it is expressly declared are not to restrict “the generality of the foregoing terms of the section (91).”

And no matter coming within any of the classes of subjects enumerated in section 91 is to be “deemed to come within the class of matters “of a local or a private nature comprised in the enumeration of the “classes of subjects by this Act assigned exclusively to the Legislatures “of the Provinces.”

The learned Judge adds: “It is not possible for each of the legislative bodies as between themselves exclusively to exercise the same powers. If the power be shown to belong to one of the bodies, this “under such a section excludes the other from the exercise of the power.”

I have taken pains to collect such of the various decisions as have reference to the construction of these sections of the Act, to aid in applying the Act to the case and the points raised before us.

Treating of the rights of local Legislatures, after a clear reference to the powers of the Dominion Parliament, Chief Justice Ritchie in *Valin v. Langlois*, page 15, says:—

“But while the legislative rights of the local Legislatures are in this sense subordinate to the right of the Dominion Parliament, I think such latter right must be exercised so far as may be, consistently with the right of the local Legislatures; and, therefore, the Dominion would only have the right to interfere with property or civil rights so far as such interference may be necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada.”

We now come to sub-section 14 of section 92—

“The administration of justice in the Provinces, including the con-

stitution, maintenance and organization of Provincial Courts, both of Civil and Criminal jurisdiction, and including procedure in civil matters in THOSE Courts."

This sub-section taken by itself would at first sight appear to include all those omnipotent powers the learned Attorney-General contends for

But following the ordinary rule for the construction of Statutes, and 3930 read by the light of the Act itself and its various provisions, and comparing these with the various decisions thereon, it will be seen that the exceeding generality of the words must be applied with very considerable modifications, indeed; and in that respect accords exactly with the principles of construction I have already laid down. *Valin v Langlois* clearly established that the Dominion Parliament has the right to interfere with civil rights when necessary for the purpose of legislating generally and effectually in relation to matters confided to the Parliament of Canada. It also established that the Dominion Parliament has a perfect right to give to the Supreme Courts of the respective Provinces, and the 3940 Judges thereof, the power and duty of trying controverted elections of members of the House of Commons, and did not, in utilizing existing judicial officers and established Courts to discharge those duties, in any particular, invade the rights of the local Legislature; and that its power over procedure in civil matters means procedure in civil matters within the powers of the Provincial Legislatures.

The Chief Justice here very truly said, and we are here to bear witness to it this day, that that question, involving the respective legislative rights of the Dominion Parliament and the local Legislatures, was one of the most important questions that could come before that Court, and 3950 that its logical conclusion and effect must extend far beyond the question then at issue. In page 14, that learned Judge draws attention to the causes which have diverted somewhat from their real aim, *i. e.*, correct conclusions, certain previous judicial decisions on the subject, which attributed too much importance to section 101, and to sub-sections 13 and 14 of section 92, which vest in the Provincial Legislatures the exclusive power as to property and civil rights in the Provinces, and the administration of Justice and procedure in civil matters.

Neither this nor the right to organize Provincial Courts by the Provincial Legislatures was intended in any way to interfere with, or give to 3060 such Provincial Legislatures any right to restrict or limit the powers in other parts of the Statute conferred on the Dominion Parliament, or to direct

the mode of procedure to be adopted in cases over which it has jurisdiction, and where it was exclusively authorized and empowered to deal with the subject matter, or take from the existing Courts the duty of administering the laws of the land.

And that the powers of the local Legislatures were to be subject to the general special legislative powers of the Dominion Parliament. The Attorney-General relied very much upon The Queen *v.* Burah, L. R., 3 App. Ca. 904, in connection with section 129 of the British North America Act as confirming the position he took up of the omnipotence of the local Legislature over the Supreme Court, and Judges, their residence, and Procedure. But with all deference and respect I must say a close examination of the authority itself supports the conclusion that it is a very strong one against his contention. 3970

In quoting Lord Selborne's judgment, while comparing the power of the Indian Legislature with those of Canadian Legislatures, he quoted that portion which says: "The Indian Legislature has powers expressly limited "by the Act of the Imperial Parliament which created it, and it can, of "course, do nothing beyond the limits which circumscribe those powers. 3980 "But when acting within those limits it is not in any sense an agent or "delegate of the Imperial Parliament, but has and was intended to have "plenary powers of legislation as large and of the same nature as those of "Parliament itself." There Mr. Attorney stopped. Had he continued to read on—the following sentences would have naturally had their influence as bearing on the sub-section (14) before us:—

"When a question arises whether the prescribed limits have been "exceeded, the established Courts of Justice must of necessity determine "that question, and the only way in which they can properly do so is by "looking to the terms of the instrument by which affirmatively the legis- 3990 "lative powers were created, and by which negatively they are res- "tricted."

Lord Selborne does not say with the Attorney-General, you must enquire into all the previous negotiations which led up to its enactment, or that we must look to a previous compact and give our legal interpretation to the Act by the light of that; but he lays down this broad rule for our guidance. "If," says Lord Selborne, "what has been done is legislation within the "general scope of the affirmative words which give the power, and if it "violates no express condition or restriction by which that power is limited "in which category would be included any Act of the Imperial Parliament 4000

"at variance with it) it is not for any Court of Justice to enquire further, "or to enlarge constructively those conditions or restrictions;" and that is the real test by which to try this case.

The case of *Valin v. Langlois* established conclusively that which has never been doubted in this Court—that the Dominion Parliament has a perfect right to utilize established Courts in the Province, and the Judges thereof, who, as the learned Chief Justice most aptly observed, are appointed by the Dominion, paid out of the Treasury of the Dominion, and removable only by address of the House of Commons and Senate of the Parliament of the Dominion, to enforce their legislation.

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That is a doctrine which has always been accepted and acted upon by this Court, *e.g.*, (in Insolvency, Customs and the like) which is established not only to carry out local laws but those of the Dominion. In the Dominion there is scarcely an Act that must not in some part be held *ultra vires* if any other doctrine were well founded. Indeed, I always understood that the Supreme Court Judges going into Confederation, were entirely Dominion Officers of a Dominion Court in the Province—to carry out the laws of the Province and the Dominion. In the great majority of Dominion Acts there are provisions not only vesting jurisdiction in the Courts in the Province, but also regulating in many instances and particulars the procedure in such matters in those Courts, *e.g.*, Customs, Inland Revenue, Public Works, Banks and Buildings, Trade Marks, Fisheries, Public Lands, Inspection of Staples, Aliens and Naturalization, Patents, Insolvency, and a host of others. Without the use of these Courts for the above purpose, or new ones established for the purpose, Dominion affairs would soon be at a dead-lock.

In *Valin v. Langlois* therefore, (p. 35,) the Court saw no reason why they should not delegate to the Judges of the several Provinces individually, collectively, or both, whom they appoint and pay, and can by address remove, and establish courts by *engrafting on* (or establishing 4030 independent of) those Courts throughout their respective Provinces tribunals eminently qualified to discharge the important duties assigned to them. "They have not thereby invaded the rights of local legislatures or brought the new jurisdiction or the procedure under it in any way in conflict with the jurisdiction or procedure of any of the Courts of the Province." And each of those Dominion Acts has reference to the procedure necessary to enforce it, and that in each case dealing with civil rights, many of them civil rights in the Province; and yet over which the local legislature has not any control or say.

The fact is, the Constitution Act of Canada only lays down broad 4040 but distinct well-guarded principles and lines of demarcation between the different legislative powers of separate legislative bodies, sometimes over the same subject, leaving these principles to be applied from time to time according to the ever-varying growth and changes in the subjects of legislation incident to a new and progressive country. Now to apply the foregoing general principles of construction to the case before us.

This provision as to the administration of justice gives the Province authority to provide for the administration of justice: that is to see that it is administered in all Courts sitting in the Province, and to declare the powers and the subjects of jurisdiction (within the limits of their own 4050 statutory authority) of such Courts as they may think proper themselves to "constitute, organize and maintain" in the Province, and to provide for civil procedure in "those" Courts (still within the statutory limitations) in the Province. Now Courts answering to this description have been established by the Province, such as Gold Commissioners' Courts, Mining Courts and the like to which these powers over procedure can apply.

No other Courts are expressly referred to, and we have seen that section 91 reserves to the Dominion everything that is not assigned exclusively to the Provincial Legislature, consequently if there be any Court in the Province not "constituted and maintained and organized" by the 4060 Province the Province cannot interfere with its procedure.

Now, it is sufficiently clear that justice can only be administered in the Province through the ordinary channels, the established Courts, *e. g.* in B. C., especially, the Supreme Court.

Then arises the question: Can the local legislature under this and the previous sub-section provide directly for the procedure of the Supreme Court? That depends on whether the Supreme Court is a Provincial Court "constituted, organized and maintained" by the Province. The Chief Justice informs me that he has entered into that point at great length and with much particularity; so that it will not be necessary, concurring as I 4070 do generally in his views on that subject, to enter at similar length upon the question. Still it is one of such importance to the point at issue, whether we are or can sit as a Full Court or not, that I am constrained to enter somewhat into the consideration of it, even at the risk of repetition; especially as I have not seen or heard what the Chief Justice has actually written respecting it.

I have already shown that the Supreme Court of British Columbia and

its Judges are the heirs of the jurisdiction, status and authority of the Supreme Court of Civil Justice of Vancouver Island and its Judges. That was an Imperially constituted Court. Its Chief Justice was empowered 4080 under the Act and Order of The Queen in Council to make Rules and orders for the practice and procedure of the Court. This power was never disturbed by any local legislation prior to Confederation. Without any declaratory statute to that effect, (for it was unnecessary), that Court administered all the Common Law and Statute Law of England applicable to a settled colony. The Court appointed under this statute had the supreme revising and controlling power over all other Courts in the colony. All others were Inferior Courts.

The present Supreme Court, too, and its Judges, are also the acknowledged heirs of the Court of British Columbia, the Supreme Court of Civil 4090 Justice of British Columbia, the Supreme Court of the Mainland of British Columbia, (under Consolidated Statutes, 1871, chapters 51, 52, 53, 54, 55, 56, 57, 58), with all the jurisdiction, powers and authorities in all matters civil and criminal, up to Confederation in 1871, that a Supreme Court could receive. The present Chief Justice was the original Judge of the British Columbian Court, sent out direct under the British Columbia Act by the Imperial Government with a Commission under Her Majesty's own hand and seal, under which he still acts. The Senior Puisne Judge of that Court was appointed by an authority also under Her Majesty's own sign manual and signet, before its Confederation with Canada, with exactly the 4100 same jurisdiction, power and authority as the Chief Justice. The second Puisne Judge was appointed in 1872 under a Royal Commission, giving him exactly the same status and jurisdiction also over all British Columbia, and all pleas civil and criminal whatsoever.

At the Union of British Columbia with the Dominion, this Supreme Court had the supreme supervising power over all other Courts in the then colony in all matters whatsoever Civil and Criminal ; and the British North America Act has continued it in that same position as the chief superintending and revising Court civil and criminal in the province under section 129 and other sections. It had ample jurisdiction 4110 over every kind of plea except admiralty; indeed the Puisne Judge too, in the absence of the Chief Judge in Admiralty, had that. The Judges by a long succession of Statutes, indeed nearly every one which touched on the question of Rules, and Orders from 1857 and 1858 down to and including the last which was passed in 1869, (British Columbia Consolidated Statutes 1871, chap. 53.) [The Supreme Court Ordinance 1869.] The

Judge or Judges have been the only authorities previous to Confederation to make the Rules of Procedure for the Supreme Court.

The Supreme Court Act 1869, and the previous one (Consol. Stat. C. 52.) were specially sanctioned and sent out from Downing street, and not 4120 altered by the Courts Merger Ordinance 1870. These gave or rather confirmed that inherent power in the Judges which existed in them previously at Common Law and still exist in them as their inherent rights, (2 Chit. Stat., p. 505, n. quoting Dowl. N. S. 323, 3 Scott N. R. 52, 3 M. and G. 125, *Readeu vs. Lord Morington* 30 L. J., 603.

That power has been disturbed or sought to be taken away from them by section 17, of the British Columbia Judicature Act 1879, and placed in the hands of the Local Government. It is this assumption which is challenged by Mr. Theodore Davie as Counsel for the Thrasher as being unconstitutional and ultra vires, and therefore void.

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As the validity of this contention must depend upon the British North America Act and the terms of Union, and we have already partially considered sections 91 and 92, we must continue our investigation into the effect of sections 129, 96, 99, 100 and 130, as read by the light of the whole Act and the various judicial decisions that have taken place upon the legal relations between the Supreme Court and its Judges and the Local and Dominion Legislatures, and then proceed to apply the principles and law deducible therefrom, to the points and the case before us.

In this research we have already seen that we must not expect to find that an Organic Act of this kind will attempt to specify particularly even 4140 all the general heads of the subjects on which either Dominion or Local Legislature can be expected to legislate. It would require omniscience to foresee what in the course of time may arise to call for legislative interference. All the framers of it could be expected to do would be what they have done in sections 91 and 92, lay down clear principles of distinction between the classes of subjects which were to be dealt with by the several Legislatures, enunciate clear principles to guide them in their respective legislations, and compile the other sections of the Act with special though inferential reference to the guiding principles so laid down, and especially guarding against clashing of authority. Now, interpreted by the principles 4150 I have been endeavoring by the aid of the more recent decisions to explain, all the parts of the Act work well enough together. Tested by any other principle they will be found to be jarring and incongruous. Now, keeping what I have said in mind, let us see what section 129 and these other

sections say ; remembering in construing them, that article 10 of the Terms of Union made British Columbia as if an original member of the Confederation, as say Nova Scotia, section 129 of the British North America says :—

“ Except as otherwise provided by this Act, all laws in force.” [In British Columbia] “ at the Union [20 July, 1871] “ and all courts of civil and criminal jurisdiction and all legal Commissions, Powers and authorities and all officers judicial, administrative and ministerial, existing therein at the Union shall continue in ” [British Columbia] as if the Union had not been made. Subject, nevertheless (except with respect to such as are enacted by or exist under Acts of the Parliament of Great Britain) to be repealed, abolished or altered by the Parliament of Canada or by the Legislature of the Province according to the authority of the Parliament or of that Legislature under this Act.”

This section Mr. Attorney contends is the strongest in his favor ; for according to his theory (the same which was started and overruled in *Regina v. Taylor* and *Severn v. the Queen*), the Province and its Legislature under section 92, and this section entered into Confederation with all its old jurisdiction and authority over the Supreme Court and its Judges, their residence, and its procedure as it had when a Crown Colony before Confederation, except what it gave up to the Dominion in Section 91, and that what is not enumerated in Section 91 belongs to the Province. This is exactly the reverse of the principle of construction, for these sections, so clearly pointed out by Chief Justice Harrison, Chief Justice Ritchie, Chief Justice Hagarty and other eminent Judges of this our Dominion of Canada. Their principle of construction is, however, now too well settled to be shaken. Under that, the words of Section 129 are to be taken in their plain and ordinary sense, and those words do expressly continue to this Court and its Judges their full jurisdiction, commissions, privileges, powers and authorities quite as fully as they enjoyed them before Confederation ; not, however, as accidentally escaped Mr. Attorney, to render Courts and Judges who are sworn to obey the Law independent of the Law, but that they should be subject to such legislation only as is provided by competent authority under the British North America Act. What that is will hereafter appear.

The local Legislature have no such clause in their favor as Section 129, handing down or returning THEIR ante-Confederation powers unbroken. There is no such section beyond the restricted though exclusive powers of Section 92.

Whence then do they derive legal authority to authorize, “ it shall be

lawful for," His Excellency the Governor-General in Council to prescribe the residences of the Supreme Court Judges (*à fortiori* the elder ones) say in Cassiar on the Arctic Slope; at Kootenay in the Rocky Mountains, or at Cariboo? or to destroy the residential unity of the Supreme Court and its Judges, so valuable in a young country for uniformity of practice and decision, and the fostering of a healthy legal atmosphere and of a learned and experienced Bar?"

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Whence comes the authority to break through the Treaty obligations of the Terms guaranteeing their status and privileges, that passed with labored care through three separate independent Legislatures and received the grave sanction of both Houses of the Imperial Parliament and the solemn imprimatur of Her Majesty's Assent? If they have not the power under Section 92 they have it not at all; and if they have it not how can they bestow it on His Excellency the Governor-General, who since Confederation would appear to have no legislative power of himself. If he have, then the Governor-General-in-Council could nullify the British North America Act, which in such case would have been passed in vain, and all 4210 the studied care of the illustrious statesmen who framed it to secure the independence of the Judges as indispensable to the administration of Justice, has been thrown to the winds.

But to return:—

Now this Court is, no doubt, so far a "Provincial" Court that it is in the Province, and its jurisdiction confined to the Province. Owing to the poverty of our language the same word is often made to do duty in many and various senses, *e. g.*, government sovereign, quasi sovereign and many others. Here the words "Province" and "Provincial." But the Province now is the Province of the British America Act, and has not "constituted" 4220 this Supreme Court. That was done by the Imperial Government, confirmed by the Colony before Confederation, and section 97 of the British North America Act and the Terms of Union placed that since the Union, in the hands of the Governor-General as regards Superior Districts and County Courts. Neither has the Province "maintained" the Supreme Court, for although it pays the expenses of Court House Buildings, Registrar, witnesses and the like, under the charge for "administration of justice," still it has not "maintained the Judges, although they compose the Court, in salaries, allowances or circuit expenses. Indeed, Section 130, I think, shows this.

That says:—

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"Until the Parliament of Canada otherwise provides, all officers of the several Provinces having duties to discharge in relation to matters other

“ than those coming within the classes of subjects by this Act assigned exclusively to the Legislatures of the Provinces, shall be officers of Canada, and shall continue to discharge the duties of their respective offices under the same liabilities, responsibilities and penalties as if the Union had not been made.”

That indicates, as I consider, incontestibly that even such payments would not have constituted the Supreme Court Judges Provincial officers, (or, as Mr. Attorney contended, Provincial officers for occasionally Dominion 4240 purposes, a sort of loan to the Dominion.) That section in effect says that notwithstanding certain Officers did at Confederation occupy a position which made them Provincial as well as Dominion officers, [such as the old stipendiary magistrates, who were also County Court Judges, local Government agents, etc.] they should now be only Dominion officers. The other alternative construction, that it only meant to say officers discharging Dominion duties should be Dominion officers bears a reductio ad absurdum on the face of it. The ratio decidendi in *Leprohon vs. the City of Ottawa*, p. 543, proves not only that the Judges are Dominion officers, and their Court a Dominion Court in the Province for carrying out Dominion and Provincial 4250 laws, but that in no respect whatever has the Province any more control over them than to send them here, to “district” them there (for that point was also specifically raised for solution by Mr. Drake and Mr. Theodore Davie in this and in the *Vieux Violand* case), than they have to send the Collector of Customs, the Collector of Inland Revenue, the Postmaster or Dominion Auditor to “usually reside and discharge their duties” at Dease Lake, Cariboo or Francois Lake.

The question in Leprohon’s case was merely as to the right to tax a Dominion officer. But the dicta in it are of great value in applying the principles on which it was decided to the cases of all other officers of the 4260 Dominion.

At page 543 of the Report we find the following :—

“ The exemption of Dominion officials from taxation rests in both cases “ (*i. e.*, in State and Federal Governments) upon the necessary implication “ and is upheld by the great law of self-preservation, as any government “ whose means are employed in conducting its operations, if subject to the “ control of another and distinct government, can only exist at the mercy “ of that government. Of what use are these means if another power may “ tax them at discretion ?” The ratio decidendi here applies to the present case. Of what use will Dominion Judges be if the local Legislatures have 4270 the right to fill up all their time with duties which they were not ap-

pointed to fulfil, to the exclusion of judicial Dominion duties? or to banish them to remote districts where they shall be useless for Dominion purposes. Our greatest Canadian Judges have in their judgments quoted largely from analogous cases occurring between the States and Federal Governments, and their officers, as being *à fortiori* cases when applied to cases between the Province and Dominion, and for this reason: that Province and Dominion derive their respective legislative authorities from the Queen, Lords and Commons in the Imperial Parliament, which is an absolute and complete sovereign power, while the States and Federal Legislatures derive theirs from compact endorsed by their sovereign, the People. In both cases the powers granted to the central power (except peace and war) are similar to those granted by the English Parliament to the Dominion; among others the power of appointing and, by necessary implication therefrom, preserving control over its own officers.

There is the additional check given to the Dominion of disallowance in cases where a Provincial Act is supposed to affect the whole Dominion or to exceed the jurisdiction conferred on local Legislatures, or even where the jurisdiction is concurrent, but clashes with the legislation of the general Parliament. This power of disallowance has been sometimes, but not invariably exerted; but, whether allowed or not, to the extent that the Provincial Acts transcend the competence of the Provincial Legislature they are void.

Then speaking of the power claimed of taxing the salaries and diminishing incomes fixed by the Dominion and within their competence, the same learned Judge uses language which, though employed with regard to taxation of income, is immediately applicable to the case of a local Legislature imposing all kinds of judicial duties on Supreme Court Judges—not appertaining to the Supreme Court—and sending them off to reside in exile far from civilization and that Supreme Court work which they contracted, and were engaged to perform:—

“ If the power exists at all it can be exercised to any extent, and in the event of any Province being dissatisfied with the Dominion Government it would hold in its hands a weapon, to which it might resort, to harass the Government and enforce its demands.”

Has British Columbia no demands to enforce? The same power if it existed would enable the local Legislature to impose new and foreign duties on a Supreme Court Judge belonging to the Dominion. The learned Attorney General talked very much of trusting to the great “discretion” of local Legislatures that no injury should ensue from the

respectice powers or laws of Province and Dominion, overlapping or conflicting with each other. Now, with the utmost deference and respect I would say on this point,—hear what that eminent jurist, Chief Justice Marshall, says on the subject: “But all inconsistencies are to be reconciled by the magic word ‘CONFIDENCE.’ * * * There is no security that in the exercise of a power, which is capable of being exercised to the detriment and embarrassment of the central Government, the Provincial Legislature will always be guided by a judicious regard for the harmonious working of all the departments of the Constitution. “What motive may be found sufficiently powerful to lead to antagonistic 4320 legislation, or whether any such motive may arise; or whether from caprice or rude theories of political economy or from any cause whatever the power now in dispute may be exercised in a vexatious manner, must be a matter of speculation.”

The learned Judge, who quoted this, spoke of Ontario; is it applicable to British Columbia? Let any one familiar with the local legislation of the last five years affecting the Supreme Court and its Judges make reply. Chief Justice Marshall, in *McCulloch vs. Maryland*, 4 Wheaton, 316, at page 428, comparing the respective rights of taxation of Federal and State Governments, and the check the people of the State are on the abuse of State 4330 taxation, adds:

“Now, the means, *i.e.*, the officers employed by the Government of the Union, have no such security, nor is the right to tax them sustained by the same theory. These means are not given by the people of a particular State, not given by the constituents of the Legislature which claim the right to tax them, but by the people of all the States.”

“They are given by all for the benefit of all; and upon theory should be subjected to that government only which belongs to all.”

Apply this to the Supreme Court and its Judges and substitute Province for States, and Dominion for Government of the Union, and the analogy is 4340 more than complete, it is *à fortiori* applicable.

In cases like this, where we have no, or scarcely any, English decisions to guide us, for such federations do not exist there, the authorities of the United States, where very similar political legislative bodies exist, though not binding on us, are entitled to the greatest attention and respect, as the production of some of the greatest jurists the world has produced, and who have given this class of questions long and profound study, while still in the prime of life and yet of great Judicial experience. All these authorities

and our Canadian decisions concur in describing the United States officers, (in our case it would be the Dominion officers), "the means and instruments 4350 " by which the affairs of the Dominion are administered." And this applies to the Supreme Court Judges.

It follows, therefore, that appointed by the Dominion, paid by the Dominion, removed by the Dominion by address through the Dominion Houses of Parliament, they are entirely officers of Canada; and to endeavor to force them by local legislation so to fill up their time by petty local work as to impede, delay or prevent Dominion work, (for if they can do it for a day they can do it for ever,) is in effect by legislation to limit the right which, on general principles, and sections 96, 99, 100, 129, 130, 131 of the British North America Act, the Dominion has to their Judicial services. Sup- 4360 pose for a moment the scheme for a general uniformity (under sections 97 and 101) of laws throughout the Dominion, (except, of course, Quebec,) actually carried out, as it surely one day will be, and the Supreme Court Judges employed to execute them in British Columbia, could the Local Legislature for one moment legislate their time away in local matters to the hindrance of their Dominion duties; yet legally they are in the same position now. They are Dominion officers for the discharge of Dominion duties and local Judicial duties in the Province so long as they do not conflict with the Dominion, and though they put in force all Provincial and Dominion laws they are in no respect officers of the Province. The *ratio decidendi* of 4370 *Valin vs. Langlois* effectually establishes that position.

In the same manner it may be shown that the Province has not "organized" the Supreme Court, so that in neither of these three senses is it a Provincial Court. And unless it were all three combined, "constituted," "maintained" and "organized" by the Province it could not be one of "those" Courts within the purview of sub-section 14.

Again, it is a rule of construction of Statutes that if it be possible a Statute should be so read that the whole of it should speak and be sensible, so that it becomes necessary to enquire, if there are any Courts in the Province which answer to the description in sub-section 14, to whom it can 4380 apply. Now there are (as we have said) such here. There are Courts constituted, organized and maintained by the Province, viz.: the Gold Commissioner's Court, the Mining Court, Courts of Revision and other Courts to which this description does apply. They, therefore, and not the Supreme Courts are the Provincial Courts within sub-section 14; and over the Procedure of all "those" Courts the Provincial Legislature has complete authority.

It is singular that this point as to the actual and literal meaning of this sub-section 14, in fact, that all this constitutional question should not before have formed the subject of a single decision in the Courts of the Dominion. 4390 It was stated by Governor Musgrave to the Judges as an inducement to them before entering into Confederation that they were to be Dominion officers and Courts. It was incidentally brought up when the now repealed Circuits Act was being rushed through the House before the ink was dry; and was clearly enough stated and raised when Mr. Richard Woods, a Registrar of the Supreme Court and an Officer in Bankruptcy, and therefore, an officer of the Dominion, was removed by the Province, an act protested against in more than one communication from the Judges, through the Chief Justice, to the Local and Dominion Governments, but never formulated as it has been now in the Thrasher case. I suppose the reason was 4400 the time was not ripe for a decision, the injury resulting to the public service from allowing it had not yet been practically exhibited. People go on in the old groove notwithstanding all kinds of radical changes, so long as it does not actually affect the little world of which each individual is the centre, and so it remains until as in this case some marked event in practice compels a close examination into cause and title.

But to return to Provincial Courts :—

By the operation of Section 129 of the British North America Act the status, jurisdiction and authorities of the Supreme Court and its Judges, as they existed at Confederation, was by that positive enactment handed down 4410 to us unimpaired in any respect, including the common law powers of the Judges to make Rules of Practice and Procedure, confirmed by the local Statutes passed before Confederation, particularly "The Supreme Court Ordinance, 1869." The Attorney-General contends to the effect that this power ceased altogether on the 19th July, the day before Confederation, when British Columbia first became a complete representative Government. But that consideration would not affect the case one whit, inasmuch as if they had the power they did not exert it while they had it, for on the 20th July they went into Confederation with the Court and Judges in full vigor and power, as I have described them, and section 129 continued and confirmed 4420 Courts and Judges in their prior estate and importance without the loss of a single particle of their power, status, jurisdiction or rights

That is applying the positive test commanded by *Regina vs. Burah*. But where is there any section of the Act which gave in any similar manner back to the Province the control over this Court and its Judges and Procedure that is now claimed for it? There is nothing but section 92, sub-

section 14, and that is always under the correction of the controlling force of section 91, which so many Canadian Judges of eminence have insisted on.

It is not my province on the present occasion to define with even 4430 approximate exactness the full meaning of the words "administration of Justice" and "Procedure," but sufficient will be gathered from the authorities cited to-day to make it clear that while under section 91 and the various sections of the British North America Act, the Dominion has several large directly statutory (as well as constructive) powers over the administration of Justice, and can engraft its powers on its own Judicial Officers and Courts throughout the Dominion, such as this Supreme Court, and makes the Criminal law and criminal procedure entirely its own, the phrase Administration of Justice in sub-section 14 when applied to the Province must have but a very limited application. "Procedure" may be defined to 4440 include all the means and modes by which causes "proceed" to such a final decision as will procure the determination of the issues raised, and the rendering of complete justice in the case. The enactment of substantial law is, within statutory limits, within the competence of the local legislature; as what shall constitute a contract? What additional local Courts are wanted; when and where? and a host of other necessary provisions in aid of the meeting or ministering of Justice within the Province to all who claim the aid of the law. But all such local Courts must from the principles and decisions I have set forth necessarily be inferior to and under the revising supremacy of this Supreme Court. It would, of course, include a power 4450 to see that justice is properly administered, and when not, that a proper constitutional remedy should be applied; but the process and means by which Justice is to be administered in a Court not within the meaning of sub-section 14, must be left to the Judges of the Superior Courts themselves.

And here I note that the moment a Judge gets a Commission he steps at once into the possession of all the Common Law and other rights, powers and status which attach to the position, like an Officer of one of the Services stepping into a command.

As to what is procedure, *Poyser vs. Minors*, 7 L. R., Q. B. D., 333, 334, 4460 is a conclusive authority. Lord Justice Lush in delivering the judgment of the Court says:

"Practice in its larger sense, the sense in which it is used in the English "Judicature Acts, like 'procedure' as there used, denotes the mode of proceeding by which a legal right is enforced, as distinguished from the law "which gives or defines the right, and which the Court is to administer

"by means of the proceeding—the machinery as distinguished from its "product."

Then quoting section 74 of the English Judicature Act of 1873 the Lord Justice goes on to say :

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' In these sections the rules in the Schedule are regarded as Rules of "Court for regulating its practice and procedure, and apart from statutory "restriction, such Rules are within the competence of any Court to make "for itself."

Now the rules of procedure here spoken of cover all the same ground and matters and proceedings as the "Supreme Court Rules, 1880," and a fortiori the "Amendments" to the Supreme Court Rules of 1880, and among these Rule 401 A, under which we are now supposed to be sitting as a Full Court. Consequently I consider that the Local Legislature were legislating on a matter not within their competence when legislating on the matter of 4480 the Procedure of the Supreme Court of British Columbia and which Poyser *vs* Minors declares to be within the competence of any Court (meaning of course the Courts he was speaking about, the Superior Courts, the High Courts and Courts of Appeal, which answer to our Supreme Court) apart from statutory restrictions, to make for themselves. The Common Law right of the English Judges to make the Rules of Procedure in their own Courts has not been taken away by the Judicature Acts, though the Imperial Parliament is really sovereign in the highest degree; which even the Dominion Parliament is certainly not. It declared and defined also whose presence should be necessary to make rules and provided for their presentation to the House, but the general power of the Judges was carefully preserved throughout.

It was contended in argument in this case that local Colonial Statutes could alter the Common Law, and the Colonial Laws Validity Act was quoted in support. But assuming such to have been the case, here there was no exercise of the right thus claimed—but the very reverse for the local Act—Supreme Courts Ordinance, 1869, section 11, (saved by the subsequent Supreme Court Act of 1870) expressly confirms that inherent right in the Supreme Court and its Judges, which previous Acts had already declared, and in that state Confederation found the Court, and in that condition handed it down to us now, subject only to the rights of the Dominion, and such Courts and procedure as it should create and the legal obligations of the British North America Act.

It follows, therefore, as a logical consequence from Poyser *vs*. Minors as

applied to the facts of this case, and the judicial construction of the British North America Act, that the Local Legislature were *ultra vires* in legislating on the procedure of the Supreme Court, and as a necessary consequence could not delegate a power which was itself beyond their own competence.

But assuming, arguendo, they had the power of legislating on this procedure direct, then by section 32 of the Administration of Justice Act 4510 of 1881, they would have made the Supreme Court Rules of 1880 into Statute Law, and have given the Lieutenant-Governor-in-Council power to repeal or alter that law.

That, I think, was *ultra vires*. Cooley on Constitutional Limitations, page 141, tells us that one of the settled maxims of Constitutional Law is that the power conferred upon the Legislature to make laws cannot be delegated by that Legislature to any other body or authority.

Where the sovereign power of the state has located the authority there it must remain; and by the constitutional authority alone the laws must be made, until the constitution itself is changed. 4520

The power to whose judgment, wisdom and patriotism the high prerogative has been entrusted cannot relieve itself of the responsibility by choosing other agencies upon whom the power shall be devolved, nor can it substitute the judgment, wisdom, or patriotism of any other body for those alone to whom the sovereign power has seen fit to confide it.

The exception which proves the rule is, that where there is an immemorial custom, as the delegation of limited powers of taxation to Municipal Corporations, that is not considered as trenching upon the maxim I have just declared *delegatus non protest delegare*. They are rather in the light of auxiliaries of the Government in the important business of municipal rule in respect of which the party immediately interested may fairly be supposed more competent to judge of their need than any central authority. By parity of reasoning the Judges of a Superior Court may from immemorial custom have been in the habit of making rules for their own Courts, and as the parties more immediately interested may be supposed more competent to judge of their own needs than any central authority. 4530

The Local Legislature could not as a delegated or, even if considered a derivative power, and if possessed of power over procedure, subject as they were to the construction which the Canadian and English Judges have put on the British North America Act, have delegated that authority to a new 4540 body of men, as the Lieutenant-Governor-in-Council in this case certainly are. The clear and vigorous judgment of Chief Justice Hagarty in Regina

vs. Hodge is a conclusive authority against such a position, although if they had had the power they could have relegated it to the Supreme Court Judges as the immemorial Common Law channel and depository of the power of making such Rules and Orders.

The "Amendments" are not only defective in this principle, but also in form, not being carried out in the only form in which they could have had (under the construction of section 32 of the local Administration of Justice Act and section 17 of the British Columbia Judicature Act, 1879,) 4550 a chance of being effective, namely, by being issued in the shape of an Order in Council instead of a Report of a Committee of Council—though that could have been instantly remedied had there been no other objection to it by returning it to the Lieutenant-Governor-in-Council respectfully soliciting the insertion of proper, operative words "it is ordered" and so forth.

But there are other defects in it, not only of form but of substance, *e.g.*, 284a: application for a new trial to a Judge of a Judicial District; there being no such official in existence here. 285a. Rule of partial and local application on a general subject. 4560

Order XI. Court of the District wherein the action has been commenced; there being none such.

Order LVIII. 399. Altering the words of a statutory enactment by a mere rule.

400A. Limiting the statutory power of appeal; enacting substantive law by Rule and Order, instead of Act.

Now leaving the lower ground of legal inference and probability, legal comparison and conclusions thereon and deduction, section by section, let us try the proposition laid before us: that the Lieutenant-Governor-in-Council, *i. e.*, the local Government, or even the local Legislature are the 4570 only proper persons to make Supreme Court Rules, Practice and Procedure by a higher standard.

Regarded in the higher light we shall be struck with the grave objections on the ground of principle, amounting absolutely to disqualification, in both these bodies, to the adoption of such a course.

It is a general principle of universal acceptance among jurists that the Legislative, Executive and Judicial departments of Government should be kept entirely distinct from each other; and the reason for this separation of functions is obvious. They are a constant constitutional and conservative check on each other. If the Legislature goes beyond its power in the 4580

enactment of substantive law, there is the Judicial department, an independent body, presumably well trained and experienced for the purpose, at hand to indicate the extent to which their powers lawfully go. If the Judiciary overstep the proper limits of their constitutional functions, there are first the Executive, where the law is clear, to call attention to the excess and suggest, and if need be enforce, a return to the correct path. If the substantive law at issue be not clear, there is the Legislature at hand to remedy the defect, and clear the way for the smooth and harmonious working of Constitutional Government.

It is for the Legislature to make the law, the Judiciary to interpret it, 4590 and the Executive to execute it; and it is the acknowledged experience now of centuries in every civilized community on the globe, that those who have to interpret the law, whose daily study and avocation it is to ascertain and follow out all the best modes of carrying it out, should be charged with and responsible for the more immediate duty of declaring and defining the Procedure by which justice is in all cases to be obtained through the medium of the Court. If the Legislature and the local Government, for such we must consider the Lieut.-Governor-in-Council to be, concur in the enactment and carrying out of a measure which is in excess of their constitutional power—and that may readily happen with the most honest and 4600 patriotic intention—then so long as the Judiciary are distinct and free from improper control the error can be set right, and the mischief remedied or prevented. The local Executive are generally chosen out of the Legislature, for their influence in that Legislature. They are therefore very likely, nay almost certain, to agree not only in the complete propriety of any given law they may enact, but in the execution of it. The importance therefore of keeping the third body, the Judiciary, sufficiently independent of local control to be able to exercise its proper functions distinct from either of the other two bodies, becomes a matter of paramount importance to every one who may possibly become a suitor in the courts; in other words, every 4610 inhabitant of the land. It is therefore the right of the suitor that these functions should be kept distinct from each other, and not be allowed to clash with, overlay, or destroy one another. The very case before us is a case in point. While an important trial involving a heavy amount of money is proceeding, Rules of Procedure are suddenly made by one of the Departments of the State above alluded to, whereby the previously existing right of rehearing (though with the ostensible intention of granting one) is suddenly cut off.

And this is the principle which is to guide us in the construction of

the British North America Act, for Chief Justice Harrison in *Leprohon v. 4620 the City of Ottawa*, 40 U. C. Q. B. p. 487, comparing the Constitution of the United States with our own under the British America Act, says,

“ In each Constitution, that of the United States and ours, we see “ traced in strong characters the separate functions of the Executive, “ Legislative, and Judicial departments of government; and provision is “ made in our constitution for the independent exercise of the executive “ and legislative functions not only by the central authority but by the “ authorities of each Province.”

Cooley on Constitutional Limitations, page 57, note, citing Webster, vol. III. There is no department on which it is more necessary to impose 4630 restraints than upon the Legislature. The tendency of things is almost always to augment the power of that Department of government in its relation to the Judiciary. After explaining the reasons of this, the power of the purse, political influence and so forth, and the mode in which this overshadowing influence insensibly grows, he concludes, “ It would seem “ to be plain enough that without Constitutional provisions which should “ be fixed and certain, such a department in the case of “ excitement would “ be able to encroach on the Judiciary.”

In another place (page 115) the same American author, in speaking of the powers of a Legislature and quoting Thompson, J., in *Dush vs. Van Kleck, 4640 Johns*, 498, says: “ To declare what the law is or has been is a judicial power, to declare what the law shall be is legislative.”

“ One of the fundamental principles of all our United States Governments is (and the same applies to Canadian Provincial Governments) that “ the legislative power shall be separate from the judicial.” Pomeroy, also a great authority in his Constitutional Law, page 71, says, “ It is a fundamental principle of the United States constitution (and the remark applies “ with equal force to the British America Act) that the Executive, Legislature and Judiciary are three distinct bodies not to be trenched upon or “ destroyed by each other.” And that being the general intent and spirit of 4650 our own Act, we are, I think, bound to apply that principle of construction to its provisions, deciding the matter before us on the high ground of its relation to a well understood principle of Constitutional law. On this ground therefore I consider that it is not legally within the competence of the local legislature to make or depute to the Lieut.-Governor in Council, or for the Lieut.-Governor in Council to make Rules and Orders for the Supreme Court of British Columbia, and had there not been several other

valid grounds for arriving at the same conclusion I should be well content to rest my Judgment entirely on the application to the circumstances of the case of the above high principle of Constitutional law.

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As the result of the various arguments and authorities on the question before us, and a careful consideration of the whole case, I cannot resist the conclusion that section 28 of the Local Administration of Justice Act, 1881, restricting the sittings of the Supreme Court for reviewing nisi prius decisions, is unconstitutional ; and that the local legislature has no power to regulate the procedure of the Supreme Court by making Rules or otherwise, or to delegate the power of so doing to the Lieut.-Governor in Council, such power residing in the Supreme Court alone, by virtue of the common law and statutory enactment previous to going into the Union, subject alone to the provisions of the British North America Act, and sections 129 4670 and 130 thereof. And I further consider that the Local Legislature has no power to diminish or repeal the authorities or jurisdiction of the Supreme Court, nor to allot any jurisdiction to any particular Judge of the Supreme Court, nor to alter or add to any of the existing terms and conditions of the tenure of office whether as to residence or otherwise by the Judge thereof.

GRAY, J.—

In July, 1880, the American ship Thrasher loaded at Nanaimo with coal. On leaving port the Defendants were engaged to tow her out. In so doing, owing, as the Plaintiffs allege, to mismanagement on behalf of the Defendants, she struck upon a rock a short distance from the entrance to the harbour, had to be abandoned, and was lost. Ship and cargo valued at \$80,000. Suit was commenced on the 18th of October 1880. Issue joined and notice of trial given on the 29th of April, 1881. Trial took place before the Chief Justice at Victoria, on the 27th, 28th, and 29th June, 1881. A special verdict was returned in favor of Defendants. Several objections were taken by the Plaintiff's counsel to the charge of the Chief Justice to the Jury. Leave was given to move for a new trial and a hearing in Banc on points reserved and for misdirection. That leave has from time to time been extended, and the right to hear the motion is now the question to be decided.

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In order to understand how so simple a matter of procedure can be involved in difficulty, it is necessary to review the local legislation which created it.

In September, 1878, an Act passed by the local Legislature to make further provision for the Administration of Justice, c. 20, 1878, authorized the Governor-General to appoint two new Judges to the Supreme Court of British Columbia, and without abolishing them transferred the business of the County Courts to the Supreme Court.

In April, 1879, "An Act to amend the Practice and Procedure of the Supreme Court of British Columbia and for other purposes relating to the Better Administration of Justice," called "The Judicature Act of 1879," was passed, introducing into the Province to a certain extent the changes then lately made in England; but the duty of making the Rules to carry those changes into effect was devolved upon the Lieutenant Governor in Council instead of upon the Judges of the Court according to old and immemorial usage. The whole Act was not to come into force until proclamation to that effect duly made—but that part as to making the Rules was to take place immediately.

At the same session in April, 1879, an Act termed "The Judicial District Act, 1879," was passed dividing the Province into districts and enacting that the Judges of the Supreme Court should severally discharge their duties and reside in the district assigned to them. This Act also was only to come into force by proclamation.

In March, 1881, an Act to carry out the objects of the Better Administration of Justice Act, 1878, and the Judicial District Act, 1879, was passed, called the "Local Administration of Justice Act, 1881," (Chapter 1). This Act made some slight alterations in the provisions as to districting the Judges, and declared it lawful for the Governor-General by order in Council to direct that the Judges of the Supreme Court should severally reside and usually discharge their duties in the defined districts, except in cases of 4720 inability or incapacity, when the nearest was to discharge the duties of the incapable Judge in addition to his own.

It then proceeded to regulate the procedure of the court in many minute details. It declared valid the "Supreme Court Rules, 1880," made under authority of the Judicature Act, 1878, by the Lieutenant-Governor in Council as modified by that Act (Chapter 1, 1881) and gave the Lieutenant-Governor in Council power to "vary, amend or rescind any of the said rules or make new rules not inconsistent with the "Act for the purpose of carrying out its scope and aim, and that of the "Better Administration of Justice Act, 1878," and by a distinct section 4730 enacted that "the Judges of the Supreme Court should sit together in the "City of Victoria as a Full Court, and such Full Court should sit only once "in each year at such time as may be fixed by Rules of Court." This Act was also to come into force by proclamation.

The Judicial District Act, was on the 9th of June, 1881, proclaimed to come into force on the 27th June, 1881, and the Local Administration of Justice Act on the 28th June, 1881, on which day the Full Court was sitting and rose.

There was no saving clause in these Acts as to any pending proceedings, and thus so far as they were legal, being matters of procedure, their 4740 provisions applied to the plaintiffs case on trial on that very day and the day following the 28th and 29th June, and he was thereby arbitrarily deprived, without reason or fault of his own, of the common right incident to all suitors in a British court, of having the ruling of a single Judge at *nisi prius* in a heavy cause of this nature, reviewed without unnecessary delay by the Full Court, an injury difficult to estimate in such a case where the witnesses were principally seafaring men.

The plaintiff's counsel being dissatisfied with the ruling of the Chief Justice, who tried the cause, obtained a stay of *postea* and immediately applied for a hearing before the Full Court. The learned Chief Justice felt 4750 himself restrained by the section 28 before mentioned, but facilitated plain-

tiff's application to the Supreme Court of Canada at Ottawa. There a hearing was refused on the ground that the court of last resort in the province had not dealt with the question.

Plaintiff's counsel then again applied for a sitting of the Full Court, as he contended under its common law right and immemorial usage to expedite the claims of suitors. Pending the consideration of that application the Lieutenant-Governor in Council, under the alleged power of section 32 of the Local Administration of Justice Act, 1881, promulgated a new Rule ordering a sitting of the Full Court in Victoria on the 19th of December. On 4760 that day the Judges met in deference to the order of the Lieutenant-Governor in Council and called the attention of the counsel in the cause and the Attorney-General to the fact, that that order was inconsistent with and in direct antagonism to section 28, the Court having already sat within the year, and that where an alleged Rule of Court conflicted with the direct enactment of the statute, for the purpose of carrying out which it was authorized, and under which it was made, the enactment must prevail.

The counsel for the plaintiff thereupon contended that the legislation and enactments referred to were *ultra vires*, and unconstitutional on various grounds, which for the sake of precision may be reduced to the following 4770 heads :—

1st. That the Supreme Court did not come under the designation of a Provincial Court within the meaning of sub-section 14, section 92, and that consequently the local Legislature had no right to regulate its procedure.

2nd. That if the local Legislature had power to make rules regulating the practice and procedure of the Supreme Court, it must itself make the rules, and could not delegate the power of so doing to the Lieut.-Governor in Council or to any other parties than the judges themselves—according to old and immemorial custom and usage.

3rd. That the Dominion Government having a legal right to utilize 4780 the Supreme Court in this Province for the enforcement of Dominion laws and rights, legislation by the local legislature which impaired, prevented or interfered with that right, was unconstitutional and *ultra vires*.

4th. That the legislation and enactments in question, both as to the sittings of the Court, the rules of the Court, its procedure and practice, and the localizing the Judges, were unconstitutional and *ultra vires*.

5th. That the Court had still the power, *ex mero motu*, to sit in banc and hear arguments on points reserved and raised at *nisi prius*, or other-

wise in proceedings in the Court, at such times as would promote the rights of suitors.

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6th. That the plaintiff having acquired vested rights by the institution of his proceedings, could not be affected by *ex post facto* legislation.

On behalf of the plaintiff, by agreement with the Attorney-General, the learned counsel was heard on these points, and the Attorney-General as *amicus curiae* in reply :—The counsel for the defendants in the interests of their clients having declined to take any part in the argument, being perfectly content with matters as they were. On the 19th December the Chief Justice handed to the Attorney-General a memorandum of certain points he thought deserving of consideration, and the argument was continued on the 5th, 13th, 16th and 17th of January.

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The Judges now severally deliver their opinions.

The questions involved are of the utmost importance as affecting the administration of justice and almost of the Dominion itself. For if the "omnipotence" claimed for the local Legislature be conceded, all Dominion legislation is futile; Dominion rights only nominal, and the Dominion itself not superior to, but simply a subordinate part of British Columbia.

As must necessarily be the case the discussion turns mainly on the 91st and 92nd sections of the British North America Act, 1867. This Act has hitherto been considered by all Courts, all Judges, all statesmen and public men, as a new departure in the constitution of Canada as well as of the 4810 several provinces forming the Dominion.

The authorities are so numerous that the position may be assumed as a recognized axiom of constitutional law when applied to Canada or its constituent parts. Says Chief Justice Hagarty in *Leprohon vs. the City of Ottawa*: "We must take the Confederation Act as a wholly new point of "departure. The paramount authority of the Imperial Parliament created "the now existing legislatures; defining and limiting the jurisdiction of "each. The Dominion Government and the Provincial Governments alike "spring from the same source."

I do not propose to discuss at any length the antecedent history of 4820 the Supreme Court of British Columbia, its powers or incidents. Whatever they were, when British Columbia went into the union she surrendered them for good consideration to the General Government and received back exactly what is defined in the British North America Act—nothing more, nothing less. She went in subject to all of the provisions

of the British North America Act, applicable to the Province. Not only is this the necessary consequence of going into the union, but it is expressly declared so to be intended by the 48th section of the Local Constitution Act, 1871, (consolidated statutes, chapter 42, section 83,) passed by the Local Legislature in contemplation of such union, viz.:

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"If the projected Union of this Colony with the Dominion of Canada "shall be carried into effect, this Act shall be construed after this Colony "has been so united as aforesaid, anything hereinbefore contained to the "contrary notwithstanding, as being subject to all the provisions contained "in the 'British North America Act, 1867,' which may by such union "become applicable to this Colony, and to the provisions contained in any "Order of Her Majesty in Council for the admission of this Colony into such "union as aforesaid, under the authority of that Act, and to the provisions "contained in any Act of the Parliament of the United Kingdom of Great "Britain and Ireland, made for the purpose of effecting such union as afore- 4840 "said, or to any other provisions framed by competent authority, other than "already mentioned, for such purpose."

What, then, bearing on this question, did she receive back? Subject to the controlling power of the 91st section and the general tenor of the whole Act, she received by the 92nd section, sub-section 14, the exclusive power to legislate as to "The Administration of Justice in the Province, "including the constitution, maintenance and organization of Provincial "Courts, both of Civil and Criminal jurisdiction, and including procedure in "civil matters in those Courts."

Standing by itself as a distinct Province, bound by no controlling connection with any other or higher authority, the powers in this sub-section would without question give an absolute dominant Provincial control; but read with the whole of the British North America Act, they must be read as affected by and subject to the general objects, uses and powers for which the Union was made, and for maintaining which efficiently that Act was passed. If by the terms and conditions embraced in the Act the General Government can use for Dominion purposes Courts in the Province—but Provincial only in the sense that their sphere of duty is confined to the territorial limits of a Province; the Province cannot so legislate as to render those Courts inefficient, and admitting that the Province can use the same 4860 Courts for its local purposes this power only gives to the instrument a conjoint character, preventing its reduction to inutility by either, and renders the preservation of its efficiency the more distinct, when the expense of

maintenance is shared by both parties, and the appointment of the directing hand given exclusively to the one which can use it for the general purpose. This principle was recognized in *Leprohon vs. The City of Ottawa*, 2 Ont. App. C 522 where it was held that the power of taxation by the Local Legislature did not extend to those means or instruments employed by the Dominion Government to carry into effect the powers conferred upon that body. The same reasoning would render unconstitutional the possession or 4870 exercise of a power by the Local Legislature to render inefficient courts the Dominion Government was entitled to use to carry into effect the powers conferred upon it.

Valin vs. Langlois, clearly decides that the Dominion Parliament may utilize the Superior Courts in the Province for the purpose of enforcing Canadian laws enacted by that Parliament within the scope of the Legislative power given to that Parliament by the British North America Act, 1867, a view which had been recognized and acted upon by this court previous to that decision. The true character and position of these courts are so clearly defined by the Chief Justice in *Valin vs. Langlois* that it 4880 almost renders argument unnecessary "They are not," he says "mere local "courts for the administration of the local laws passed by the Local Legislatures of the Province in which they are organized. They are the courts "which were the established courts of the respective Provinces before confederation, existed at confederation, and were continued with all laws in "force, as if the Union had not been made by the 129th section of the British "North America Act and subject therein as especially provided, to be "repealed, abolished or altered by the Parliament of Canada, or by the "legislatures of the respective Provinces according to the authority of parliament or of that legislature under this Act. They are the Queen's Courts, 4890 "bound to take cognizance of and execute all laws whether enacted by the "Dominion Parliament or the Local Legislatures. Provided always such "laws are within the scope of their respective legislative powers"

A higher authority or a better definition we could not have.

The Federal Government by Parliamentary authority appoints, pays and removes the judges as pointed out by Imperial and Dominion Legislation. The Local Government merely provides the subordinate officers and local machinery. Without a judge there can be no court, and the Local Government cannot appoint one to that court. The Supreme Court of British Columbia cannot therefore be exclusively a Provincial Court. By the effect 4900 of the British North America Act it becomes a Federal Court, acting within a defined territorial jurisdiction, and as incident thereto for the purpose of

its existence and efficiency in carrying out both the Federal and Provincial laws, cannot be controlled in such a way by local legislation, in regard to procedure or otherwise, as to render its action ineffectual. It was so intended by the British North America Act, in order that the Administration of Justice, and the judges themselves might be uninfluenced by local, political or personal considerations. Under the 129th section, the Canadian Parliament adopted the Court with its power and authorities as existing previous to confederation, clothed it with combined duties, and increased 5000 jurisdiction, to carry out as the law of the land in civil as well as in criminal matters, statutory enactments made beyond the territorial limits of the Province, rendering their operation compulsory, not operative through comity only, and preserves the Court, subject only to be abolished, altered or affected by the Dominion Parliament or the Local Legislature, as the British North America Act permits.

The 14th sub-section is divisible. 1st. It confers on the Local Legislature the exclusive power of making laws relative to the administration of justice in the province. That power it has been decided means limited to the matters on which the Local Legislature can constitutionally legislate, 5010 that is as defined in the 92nd section, otherwise the whole Dominion legislation so far as it has to be carried out in the Province might be rendered nugatory. 2nd. It confers the power of constituting, maintaining and organizing "Provincial Courts" both of Civil and Criminal Jurisdiction. If, therefore, the Supreme Court of British Columbia be a Provincial Court in the limited meaning of being organized and maintained by the Province, the Local Legislature may so restrict its powers as entirely to prevent the enforcement of Dominion Legislation on the very matters over which the British North America Act gives the exclusive power to the Dominion Parliament, and thus paralyze the action of 5020 the Federal Government in the Province. 3rd. It confers the power of legislating as to procedure in civil matters only in "those courts," that is the Provincial Courts, the Courts the Province constitutes, maintains and organizes, otherwise again it may render abortive the enforcement of Dominion Laws on the matters confided to the Dominion Parliament and by that Parliament deemed necessary for the good government of Canada, e. g., if it can say the Supreme Court shall sit only once a year, it may equally say it shall sit only once in five or ten years, and thus, this being a matter of procedure, every step taken to enforce a Dominion Law in Civil matters be completely nullified. This power pure and simple is claimed to 5030 its fullest extent for the Local Legislature. It cannot be conceived that the

Constitution intended anything so inconsistent—that the Dominion Government should pay for Judges, and largely bear the maintenance of Courts over which it has no control, and which may at any moment be used to neutralise Dominion Legislation.

The 96th, 99th, 100th and 130th sections distinctly make its Judges officers of the Dominion.

The Provincial Courts—by this section intended—it is submitted, are those of which the Province bears the entire expense, and has the sole control, similar to the State Courts in the United States ; though owing to the 5040 difference in the constitution of the two countries the jurisdiction of such Provincial Courts could not be co-extensive with that of the State Courts.

In such a view there is *nothing* that conflicts with the *strictissimis verbis* of the 14th sub-section, while it makes reconcilable the general operation of the whole British North America Act, and preserves the unity of its various parts. The British North America Act contemplated and effected the transfer from the Provinces to the Dominion of all properties, institutions, and powers that were essential to the good government of Canada. By the 107th and 108th sections the public funds and public properties were transferred. By the 129th section and the limitation of 5050 the powers of the local Legislatures in the 92nd section ; and the 91st, the 96th, the 99th and 100th sections, the control of the Superior Courts passed to the Dominion to be exercised when and as the public interests required.

As repeated time after time in *Valin vs. Langlois*, (3 Supreme Court Can., R., page 1,) you are to look at the whole of the British North America Act for its meaning. It surely cannot be successfully contended that after conferring the great powers that Act conferred upon the general Government and Parliament for the public interest, it meant to take them all away again, or to place it in the power of a subordinate Legislature to do so, and to disarrange the whole machinery of the Dominion Administration of 5060 Government by the words used in the 14th sub-section of section 92.

In view of this 129th section, it may be desirable briefly to refer to the organization of the Supreme Court of British Columbia, as it existed at the time of the Union with Canada. By the Supreme Court Ordinance, No. 113, March, 1869, provision was made for the merger of the then two existing Courts called the "Supreme Court of the Mainland of British Columbia" and "the Supreme Court of Vancouver Island" into one Court to be called the "Supreme Court of British Columbia," and for the appointment of a Puisne Judge, and that all the jurisdiction, powers

and authorities of the two then existing Supreme Courts, and of the Judges 5070 thereof, should be vested in, and should be had, exercised and enjoyed by the said Supreme Court of British Columbia and the Judges thereof. By the 13th section of that Ordinance the Chief Justice of the new Court was authorized and empowered from time to time to make all such Orders, Rules and Regulations as he should think fit for the proper Administration of Justice in said Supreme Court, and, subject to such Orders, Rules and Regulations, the existing Rules of the Court of the Mainland should have full force and effect in the said Supreme Court of British Columbia. By No. 120, 9th March, 1869, "An Ordinance to amend Civil Procedure," provision was made repealing the Vancouver Island Civil Procedure Act, 1861, 5080 and introducing certain parts of the Common Law Procedure Acts, 1852 and 1854, and of the Statutory enactments regulating the Practice, Pleadings and Procedure of the High Court of Chancery, and by the 5th section of this last-named Ordinance, the Judge of either of the said Courts was empowered from time to time, with the approval of the Governor for the time being, to make general orders modifying such procedure at Law or in Equity in the Court in which he presided.

By an Act passed in April, 1870, (chap. 54, Consolidated Statutes) the merger of the two Courts was declared to have taken place on the 29th March, 1870, and by section 4, the last-named Act transferred all the business then pending in both Courts to the new Supreme Court, and preserved the provisions of the Ordinance, No. 113, 1869, called the Supreme Court Ordinance, 1869, just referred to. Such were the relative positions of the Supreme Court and the local Legislature at the time of the Union on the 20th July, 1871.

The Legislature had at that time by positive legislation made the English Practice and Procedure the law of the Province to a certain extent, and left to the Judges the duty and power of making the Rules or Regulations necessary to carry on the business of the Court in all other respects, than as declared or set out in the English Practice and Procedure to the 5100 extent so introduced.

By the 129th section of the British North America Act all Laws, Courts, Commissions, Powers and Authorities were to continue until altered by competent authority. What authority? The power of the local Legislature is by the 92nd section limited to the defined subjects over which it has exclusive power. The Dominion Parliament cannot touch the subjects over which such exclusive power exists; but the Dominion Parliament itself is not limited to the subjects defined in section 91. It has exclusive

power over all subjects to which the exclusive power is not given by section 92 to the local Legislature.

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Again, to quote the language of the Chief Justice in *Valin vs. Langlois*: "This may be termed a Constitutional Grant of Privileges and Powers "which cannot be restricted or taken away except by the authority which "conferred it, and any power given to the Local Legislature must be sub- "ordinate thereto." It was decided in that case that the Dominion Parliament had the right to utilize the Superior Courts of the Province, and to legislate as to the Procedure in those Courts, in the civil matters in which it is so determined to use them. If so, the Local Legislature has not the exclusive right to legislate as to Procedure in civil matters in those Courts.

The "procedure" therefore in that sub-section 14 specified must have 5120 reference to Courts in the Province, over which the Local Legislature of the Province has exclusive control, because, *ex ratione*, if the Dominion Parliament has a power to legislate as to procedure in civil matters in certain courts in the Province, those must be courts over which the Local Legislature has not the exclusive power to legislate as to procedure.

It is a clear canon as to the construction of statutes, that you must give force and effect to every word, as far as it is possible. The governing words in this sub-section, and section 92, as bearing on this sub-section, are "exclusively" and "those Courts." They are thus "linked" and the character of the court is clearly specified. 5130

The general authority conferred by 91, being to legislate on all matters not coming exclusively within 92, thus pertaining to the Dominion Parliament, the 129th section steps in, authorizing legislation as to the existing Courts in the Province, by the Parliament of Canada or the local Legislature, as one or the other under the British North America Act may be entitled.

The Parliament of Canada has legislated upon the subject, has by imposing certain duties upon the Supreme Court for Dominion purposes in matters connected with the Civil Administration of Justice in the Province altered the constitution of that Court, increased its jurisdiction, and ex- 5140 pressly shewn by legislative enactment that it is not a Court over which the local Legislature has the exclusive power to legislate. The exercise of this power has by the Supreme Court of Canada in *Valin vs. Langlois*, been declared constitutional. In furtherance of the observations of the Chief Justice, Mr. Justice Fournier referring to the extensive powers given to the Federal government over these Courts by the 129th section says: "Could

“ stronger or fuller language be used to give jurisdiction over these Courts, “ I think not. The effect of this section, to which they owe their very “ existence is evidently to place them under the legislative power of the “ Federal Government, as well as it is true under that of the local Govern- 5150 “ ment, and to make them, in fact, common to both these Governments, for “ the administration of the laws adopted by them within the limits of their “ respective powers.”

Mr. Justice Henry: “ The whole purview of the Act, with a proper consideration of its objects, is evidence of its policy to limit local legislation to those civil rights in the Province not included specially, or otherwise, in the powers given to the Dominion Parliament.” As to sections 13 and 14,—“ Guided, by the purview of the whole Act, deducting the indirect and incidental powers of legislation given by the Act to Parliament, 5160 the local Legislatures have the exclusive right to legislate only in regard to the remainder. The 14th sub-section gives local authority to deal with the administration of Justice in the Province, in regard to the subjects given by the Act. And to that extent only to provide for the construction, maintenance and organization of Provincial Courts, in reference to those and kindred subjects. The words ‘ Procedure in Civil matters in those Courts’ must be considered with the context and with the objects and other provisions of the Act.” (77)

Mr. Justice Taschereau says: “ The Administration of Justice is given to the Province, that is true; but that cannot be understood to mean all and everything concerning the Administration of Justice.” (81) 5170

Mr. Justice Gwynne is equally decided.

As the local Legislature cannot supersede the action of the Dominion Parliament, it cannot deprive the Court of the character thus given to it by such legislation, or the Dominion Parliament of the use they may take of it. If so, it has no exclusive control, and if it has not exclusive control it cannot legislate as to that Court’s procedure, because by the 91st section, what it cannot exclusively legislate upon the Dominion Parliament alone has the exclusive power to legislate on. If these terms, so used in the 91st and 92nd sections, are to have any legal meaning, they negative a joint authority. It is the logical sequence, that if the local Legislature 5180 alone has power to legislate on matters coming within 92, and the Dominion Parliament has legislated on the duties and procedure of the Superior Courts in the Province, and that legislation has been declared constitutional, then those superior Courts cannot come within the class embraced in sub-section 14, section 92, because with reference to that class the local Legis-

lature, having the exclusive power, the Dominion Parliament cannot legislate. The action, therefore, of the Dominion Parliament and the Judgment of the Supreme Court of Canada, amount to a Legislative and Judicial declaration to that effect.

The term "exclusively," in 92, it must be borne in mind, has reference 5190 to, and is legally, a part of every sub-section, and every sub-division of a sub-section, and therefore applies to each of the sub-divisions into which the sub-section can be divided.

It cannot be contended that in the same Court on the same subject, the rights of suitors in Civil matters, there can be two different Rules of Civil procedure, that you can say to one: Your case shall be heard immediately, and as often as your business requires, because the redress you are seeking springs out of Dominion legislation; but to the other, You cannot be heard, for one, five or ten years, because the debt you seek to recover pertains, so far as procedure goes, to the control of the local Legislature. 5200 Yet such must be the case, if one or the other has not the exclusive power, the Dominion Parliament or the local Legislature.

If a Provincial Legislature positively enacts, that on a particular subject, and in a Provincial Court, within its legislative jurisdiction, and under its exclusive control, a particular course shall be adopted, the suitor may or may not avail himself of that Court. But to adjudge that in the only Court to which he can resort, a Court used for Dominion as well as Provincial purposes, and in which the Dominion Parliament has constitutionally exercised the right of regulating procedure, he may be so used, is introducing an element entirely at variance with an im- 5210 partial administration of Justice, and one never contemplated under the British North America Act. The procedure in such last-named Court must be either under Dominion or Provincial control, and the former has legally assumed it. Nor is this assumption limited merely to matters of Dominion Legislation. The Supreme and Exchequer Courts Act, c. 11, 38 Victoria, A. D. 1875, is especially created and clothed with power for hearing and granting appeals, not only in matters over which the Dominion Parliament has power to legislate, and arising out of laws and proceedings with which the Dominion Parliament and Government alone are connected, but also for hearing and granting appeals 5220 in matters falling strictly within the purview of the administration of Justice in civil matters assigned to the local Legislature under section 92.

The 11th section of that Act restricts the appeal to an appeal from the

Court of last resort in the Province where the Judgment was rendered in such case, and by the 17th section enacts that "subject to the limitations and provisions hereinafter made, an appeal shall lie to the Supreme Court from all final Judgments of the highest Court of Final Resort, whether such Court be a Court of Appeal, or of original jurisdiction (now or hereafter established in any Province of Canada) in cases in which the Court of original jurisdiction is a Superior Court."

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Here is a clear statutory right given to suitors (defined as to the mode of Procedure by which it is to be obtained from its inception in the Court of last resort in the Province to its hearing in the Supreme Court of Canada) to an appeal from the Superior Court of the Province in all final Judgments, not judgments limited to matters springing from Dominion, but equally from local legislation.

By the first Act of the Dominion Parliament passed in that same session, C. I. 38 Vic. 1875, 2nd section, it is enacted as an amendment to the 18 sub-section of section 7 C. I. 1867, the "Interpretation Act" that the term Superior Court shall in the Province of British Columbia denote "The 5240 Supreme Court of British Columbia."

Thus in the Supreme Court of British Columbia we have in force a Dominion statute regulating procedure even in staying an execution in the sheriffs hands in matters arising or that may arise out of Local Legislation. How then can it be said, that this Court comes within the class of Provincial Courts, over which the exclusive power is given to the Local Legislature to legislate as to procedure, when if so, that Legislature may take away from the suitor, as by its action in the present case, if legal, it has done, the very highest right conferred upon him by the Dominion Parliament?

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The inference is irresistible, that this superior Court, with jurisdiction to deal in civil matters arising from Provincial as well as Dominion Legislation, was by the Parliament considered as not coming within the class of courts specified in the 14th sub-section and therefore not under the control of the Local Legislature as to procedure, and it was so considered by the Parliament of Canada, because it was essential to the good government of Canada as affects the administration of Justice that it should be so.

This view again is in accordance with the principle laid down in the *Queen vs. Burah* 3 L. R. ap. Ca. 889. In order that an Act passed by the 5260 Local Legislature should be valid, it must be within the powers expressly

limited by the Act of Parliament which created it. Within those limits its powers are no doubt plenary, but it can do nothing beyond the limits which circumscribe those powers. Apply the limitation here. Such subjects as being exclusively given to the local legislature the Dominion Parliament cannot legislate upon. Whatever, therefore, the Dominion Parliament can constitutionally legislate upon must be beyond those limits, and, therefore, the local Legislature cannot legislate on the same subjects.

Though this local legislation be pronounced unconstitutional, the Court itself for the purpose of the administration of Civil Justice in 5270 the Province is not left without ample power of procedure. What it had at the time of the union, under the 129th section, still remains, and for what may be required the existing law of that date still continues which gave power to its Judges to make rules, besides the inherent power in Courts of superior jurisdiction at common law independent of any statutory authority to govern their own procedure in the interest of suitors—(Morris *vs.* Hancock, 1 Dowlings N. S., 323, *Ex parte Strong*, 8 Excheq. 199. Bartholemew *vs.* Carter, 3 Scott, N. S., 529 3 M. & G. 135,) a power which it must be assumed the Dominion Parliament and the Supreme Court of Canada recognized when under the reservations in the British North America Act, 5280 the Supreme Court of British Columbia was taken from the exclusive control of the local Legislature as to Civil Rights and Procedure.

The local Legislature by its own act, and by the legal operation of the 129th section, gave the power it possessed over that Court to the Dominion Parliament, and the Dominion Parliament by legislating on the subject accepted it. The power still exists, but transferred to other hands, and the Local Legislature has not the exclusive power of legislation as to the procedure of that Court, and if not exclusive, none.

It was intimated by very high authority in *Severn vs. The Queen*, S. C. C. R. 71, that it could not be supposed that the local Legislature would 5290 legislate save for a legitimate purpose. The same idea has also elsewhere been often expressed, and is doubtless theoretically correct; but in *Leprohon vs. The City of Ottawa*, Ontario Appeal Court, Vol. 2, 563, Mr. Justice Patterson takes a view somewhat more in accordance with human experience and human nature. "There is no security," he says, "that in the exercise of a power which is capable of being used to the detriment or embarrassment of the Central Government, the Provincial Legislature will always be guided by a judicious regard for the harmonious working of all the departments of the Constitution. What motive may be found sufficiently powerful to lead to antagonistic legislation, or whether any such motive 5300

“may arise, or whether from caprice, or from crude theories of political economy, or from any cause whatever, the power now in dispute may be exercised in a vexatious manner must be a matter of speculation.”

That exceedingly plain, common sense language finds a not inapt illustration in the case before us. The Judicature Act, 1879, was passed for a good object in the interests of suitors to simplify legal proceedings and expedite business. By its 4th section it abolished the terms into which the legal year was divided, and declared that, subject to Rules “of Court, etc., “the Supreme Court and the Judges thereof shall have power to sit and act, “at any time and at any place for the transactions of any part of the business 5310 “of such Court, or of such Judges, or for the discharge of any duty which “by any Act of Parliament or otherwise is required to be discharged during “or after term.”

It then gave power to the Lieut.-Governor in Council by section 17 to make Rules of Court. “To regulate the sittings of the said Supreme Court “as a full Court or otherwise, and of the Judges thereof, sitting in Chambers, and for regulating the vacations to be observed by the Court and the officers thereof.”

Under this Act, Rules of Court called Supreme Court Rules, 1880, were made and promulgated on the 16th October, 1880, to come into force on the 5320 15th Nov., 1880, and among them several regulating the sittings of the Supreme Court, namely :—

1. Save as by the Act or these Rules is otherwise provided, every action, proceeding, or matter in the Supreme Court, and all business arising out of the same, shall, so far as is practicable and convenient, be heard, determined, and disposed of before a single Judge sitting in Court or in Chambers, as circumstances may require; and in Victoria such sittings in Court or in Chambers respectively shall, so far as is reasonably practicable, be held continuously throughout the year or as often as the business to be disposed of may render necessary. 5330

2. A Full Court shall consist of not less than two Judges of the Supreme Court sitting together, and shall, besides exercising the jurisdiction assigned to it by the Act, hear and determine appeals, or applications in the nature of appeals, from any judgment, ruling, or order of a single Judge, excepting orders mentioned in Section 8 of the Act; and shall hear and determine Special Cases where all parties agree that the same be heard before a Full Court.

3. Sittings of the Full Court in Victoria shall be held as often as the business to be disposed of may render necessary.

4. All appeals to the Full Court shall be by way of re-hearing, and 5340 shall be brought by notice of motion in a summary way. The appellant may by the notice of motion appeal from the whole or any part of any judgment, ruling, or order, and the notice of motion shall state whether the whole or part only or such judgment, ruling, or order is complained of, and in the latter case shall specify such part.

By an Act passed on 25th March, 1881, c. 1, called, "The Local Administration of Justice Act, 1881," section 10, the section 4 of the Judicature Act of 1879 (heretofore quoted) is amended by substituting in lieu of the part therein as to the sittings the following. "Subject to the Rules of "Court and the Provisions of this Act, and of the Judicature Act, 1879, the 5350 "Supreme Court and any Judge or Judges thereof shall have power to sit "and act at any time and at any place for the transaction of any part of the "business of such court or of such Judges or for the discharge of any duty "which by any Act or otherwise would heretofore have been or is required "to be discharged during or after term."

By section 32, "The Supreme Court Rules, 1880," it is enacted, shall, "as modified by this Act be valid, and the provisions of any Act or ordinance inconsistent therewith are hereby repealed and the Lieut.-Governor "in Council shall have power to vary, amend or rescind any of the said "Rules, or make new Rules provided the same are not inconsistent with 5360 "this Act, for the purpose of carrying out the scope and aim of this Act and "the Better Administration of Justice Act, 1878. The said Rules need not "be uniform, but may vary as to different districts in the province as circumstances may require, and section 17 of the Judicature Act, 1879, with "respect to Rules of Court shall continue to be in force subject to said "Proviso."

Conceding for the sake of argument that the Local Legislature has power to regulate the procedure of the Supreme Court, it is plain that under the amendment to section 4 of the "Judicature Act, 1879," and the "Supreme Court Rules, 1880," assumed and made valid by legislative 5370 enactment in this section, the Supreme Court could sit to expedite business whenever required, but contemporaneously with this same section and in the same Act, section 28 says: "The Judges of the Supreme Court shall "have power to sit together in the City of Victoria, as a full Court, and any "three of them shall constitute a quorum, and such Full Court shall be "held only once in each year at such times as may be fixed by Rules of "Court, and such Court shall constitute a Full Court." This of course is

directly contradictory to the Rules just previously adopted and made statutory by Legislative enactment.

Under the power in the 32nd section to make new Rules not inconsistent with this Act, a Rule was made to hold a full court on the 19th of December, *i.e.* within six months after the previous Full Court had been held. Being in direct violation of the positive enactment in the very statute which authorised the rule to be made, even were there no other grounds of objection, it could not be made operative, (Cockburn, Ch. J., Christ Church College *vs.* Martin L. R. 3 Q. B. D. 29.)

To summarise the legislation under this statute, if legal, it would be an order to the Supreme Court ; 1st, to sit continuously ; 2nd, to sit only once a year ; 3rd, to sit more than once a year, if "not inconsistent" with the enactment to sit only once a year. It is difficult to bring such legislation within the assumption expressed in *Severn vs. the Queen*. It seems more naturally to fall within the view expressed by Mr. Justice Patterson in *Leprohon vs. the City of Ottawa*. It was contended that the act was not retrospective, and therefore the Court could sit on the 19th December, but these provisions being matters of procedure, the Act in that respect was retrospective, and the court clearly could not sit. (Poyser *vs. Minors*, 5 L. R. 7, Q. B. D., 329.)

This power of suspending the Sittings of the Court for any period at the will of the local Legislature, or by rules made an assumed delegated authority from the Legislature, and absolutely controlling its procedure, is no light matter. "If the power exists at all" (as says Mr. Justice Burton with reference to taxation in *Leprohon's* case) "it can be exercised to any extent, and in the event of any Province being dissatisfied with the Dominion Government it would hold in its hands a weapon to which it might resort to harass the Government and enforce its demands."

It is a question of principle, not of degree, and in this instance is in violation of the rights of Suitors under *Magna Charta*, "*nulli negabimus aut differemus justitiam vel rectum*." As also of the right and duty of the Court to advance appeals, where irreparable damage may be caused by delay. (*Lazenby vs. White*. L. R. 6 Ch. Ap. 89. *London & Chatham & Dover Railroad Company vs. The Imperial Mercantile Credit Association*. L. R. 3 Ch. Ap. 231.)

Yet this power of legislation to the most unlimited extent is claimed for the local Legislature, even to that of direct antagonism to Dominion legislation, under the authority (the Attorney-General contends) of Mr.

Justice Fisher's words in *Steadman vs. Robertson*, New Brunswick Reports, "All the powers possessed by the Legislature of New Brunswick still exist as potential as ever," but (he omits the learned Judge's qualification) "they are distributed between the Parliament and local Legislature, and "are exercised in each according to the limitations of the constituting Act." 5420 This qualification so clearly refutes the pretension that it is unnecessary further to notice it.

Equally unavailing to sustain the claim is the assertion that the Judges themselves are Provincial officers and thus shew conclusively the Provincial character of the Court. Apart from the distinct provision in section 91, sub-section 8, and the concluding paragraph of 91, and the direct words in the 96th, 99th and 130th sections, in Leprohon's case (2 Ont. Ap. 526) we find it laid down: "Provincial officers are those over whose salaries the Province has control," and at 537, "The officers "of the Dominion do not exercise their functions within the bounds of 5430 "any Province by the permission of the local Government. They are "there by authority of a higher power. The Province has no sovereignty "over them or their salaries as existing by its authority, or introduced by "its permission." If the right here contended for could be sustained, equally could the Dominion Government interfere with the Provincial officers appointed and paid by the local Government and Legislature, a doctrine too unconstitutional to be thought of. The reason for this separate control is expressed in a few words. In *Collector vs. Day*, 11 Wall. 113, also cited in Leprohon's case, "Any Government whose means are em- 5440 "ployed in conducting its operations, if subject to the control of another and "distinct Government, can only exist at the mercy of that Government."

We are thus brought down to the broad question how far the section 28, C. 1., the local Administration of Justice Act, 1881, comes within the power given by sub-section 14, section 92, British North America Act, and to what extent the local Legislature has power to make rules, or to delegate to the Lieut.-Governor in Council the power to make Rules regulating the procedure of Supreme Court. This latter power (it was pressed by the Attorney General at the close of his argument) had been recognized by the Supreme Court of the Province in three separate judgments delivered by the three several Judges on different occasions, and had thereby become the 5450 judicially declared law of the land. With reference to these Judgments each Judge has to speak as to the one delivered by himself, because, incredible as it seems, in a Province where many of the most complicated questions have arisen since the Union, affecting the Constitution and

powers of the Government, no provision whatever is made for reporting the decisions of the Court, or of the separate Judges, or of making any reference to what might be termed an official declaration of what the Law is. All knowledge of the reasons for the decisions depends merely upon verbal statements, or the voluntary action of a Judge in giving a copy of his Judgment to one of the newspapers, which may or may not publish it, 5460 as inclination dictates ; a degree of parsimony which, in the interests of suitors coming before the Court, and of the public at large, it is not exceptional to pronounce as inexcusable.

In the case of *Pamphlet vs. Irvine*, heard before myself in August 1880, the questions now raised did not then arise. In that case the point was : That under the local Administration of Justice Act, 1881, the local Legislature having under section 17 of the Judicature Act, 1878, directed the Lieut.-Governor in Council to make Rules of the Supreme Court for carrying that Act into effect, he had no power to issue a Proclamation directing somebody else to make those Rules. And it was held that 5470 he had no such power, that the Legislature having selected him to discharge that duty, upon the principle of "*Delegatus non protest delegare*," he could not transfer either the power or the duty to any one else, a decision to which I still adhere ; but the questions were not then raised which are now raised for the first time in the Province, namely : First, That the local Legislature itself had no power to make Rules regulating the procedure of the Supreme Court ; Secondly, That if it had such power, it must exercise it itself, and could not delegate it to the Governor in Council ; Thirdly, If it had such power and had exercised it by adopting certain Rules called the "Supreme Court Rules, 5480 " 1880," and making them Law by Statutory enactment, it could not delegate to the Lieut.-Governor in Council the power of making Rules to alter or revoke the Rules so adopted and made Statutory ; and fourthly, That the Rule made, under such last-named assumed power, directing the Full Court to sit on the 19th of December, was not only illegal on that ground, but also as being directly inconsistent with the positive enactment of the Statute, which authorized the Lieut.-Governor to make such Rules as were not inconsistent with the Statute, which that manifestly was. The reasoning and authorities cited in *Pamphlet vs. Irving*, to which I now refer and add a copy hereto, as there are no reports from which it can be quoted, thus 5490 become on the question of delegated authority, so far as bearing upon the questions now raised, in point, and are fully sustained by Cooley on Constitutional Limitation, 141 *et seq.* 29.

Such legislation as the present, it may further be said, though it does not in words, yet it does in fact indirectly, if not directly, interfere with the trade and commerce of the country. For what shipowner, British, Foreign or Colonial, will send his ship and cargo into a country where under an alleged claim of regulating procedure in Civil matters in the Courts of the Province, the Local Legislature or its Government, authorized by its Legislature, can, when legal troubles or difficulties have arisen, and 5500 the intervention of the Superior Courts in the Province has been invoked between such owners and the inhabitants, close down the doors of Justice, deny the right of being heard, and tell him all adjudication upon his rights shall be refused for one year, or five years, or ten years, or if the claim of "Provincial omnipotence" holds good, forever. What trade or commerce can flourish under such circumstances ?

Such *ex post facto* legislation is unknown to English Law : is directly in violation of the Constitution, and without sanction from any of the powers conceded by the British North America Act. It is difficult within the limits of Judicial restraint to find words sufficiently strong to condemn 5510 it.

Dangerous as are the uses to which such a power may be converted, it is, nevertheless, in the absence of any Judicial authority as to the Constitutional construction now for the first time raised, and put upon the 14th subsection of section 92, and in the presence of the fact that in one or more of the Provinces, local legislation has been occasionally passed under a different impression, it is, I say, only after long and careful consideration that I have felt compelled to come to the conclusion that the Local Legislature has not the power to make Rules to govern the Procedure of the Supreme Court of the Province, or to delegate that power to any one else, and that it cannot 5520 legislate in a way to deprive suitors of the right of access to that Court, in matters coming within its jurisdiction, or impair the use the Dominion Government and Parliament can make of that Court ; and that it is not necessary to wait until a case arises in which Dominion interests are involved, so to decide ; but if the legislation be capable of being so used, it must, whenever the objection is taken, be pronounced *ultra vires*.

I have said, in the absence of any Judicial authority, for it must be remembered that the case of *Valin vs. Langlois*, conclusive as it is, to the extent to which it goes does not yet cover the whole ground raised in this case, for the points now raised were not then brought up. That 5530 case established conclusively the right of the Dominion Parliament to the use of the Superior Courts of the Provinces for Dominion purposes, and

to the further undoubted right of regulating procedure in those Courts, so far as was essential for those purposes, but it was not necessary then to consider, or to decide, whether the entire control of the procedure in those Courts was not withdrawn from the local Legislature by the effect of the 91st section, and the words of limitation in the 92nd section and sub-section 14 of the 92nd section and of the 129th section, and that though the Local Legislature might have the undoubted right to legislate as to all matters relating to the Administration of Justice constitutionally coming within 5540 their control under the 92nd section, yet whether the mode or procedure for carrying out that legislation, when suits were instituted in the Superior Courts, must not be left to the Courts themselves to regulate, under their Common Law powers, or statutory powers, existing at the time of the Union, or under such Rules as the Dominion Parliament might prescribe or authorize to be made for their governance. Whether in fact such Courts could be considered as coming within the exclusive term "Provincial Courts," designated in that sub-section over which the local Legislature, it is not questioned, has the absolute control, and also the exclusive power and privilege of constituting, organizing and maintaining. 5550

There is yet another point to be considered. Among the objections raised is one to the constitutionality of the application of the "Judicial District Act, 1879," under which the power is claimed by the Local Government of dislocating the Judges and enforcing through the operation of the Dominion Government their compulsory residence in certain assigned Districts. Coinciding to the fullest extent in the views expressed by the Chief Justice and Mr. Justice Crease, as to the injurious tendency of such a measure upon a uniform administration of Justice throughout the Province, and in the absence of any adjudication, admitting for the sake of argument, that the power to divide the Province into judicial Districts falls 5560 within the legislative power of the Local Legislature under the 14th sub-section 92, it may nevertheless be questioned how far a restriction as to residence, in the absence of any Imperial or Dominion legislation on the subject can be constitutional or legal or morally obligatory even upon Judges appointed after that Act was passed, but clearly it cannot be retrospective in its operation as to judges holding their appointments and Commissions in and to British Columbia long antecedent (ranging from nine and ten to twenty years,) to its enactment, and any action of the Imperial or Dominion Government thereon would be governed by that principle. Their Commissions were restricted to no locality in British Columbia, their 5570 tenure of office under those commissions was during "good behaviour," a

statutory protection under Imperial Legislation not only to themselves, but to the suitor in the courts and to the public at large against undue Government pressure of any kind or from any quarter, a provision absolutely necessary to secure the independence of the Bench and impartial administration of justice.

It is idle to say that a power to send a Judge into comparative exile and to inflict expense and ruin on himself and his family will not produce a disastrous influence on his conduct. It must become servile obedience or forced resignation. If that be an incident of the office he holds, it should 5580 be one attached by law at the time of his appointment, and a risk which he should have the opportunity of accepting or refusing—but to force it upon him in the decline of life, and after years of Judicial service, is a breach of the conditions of his appointment, and in violation of Constitutional Law and Practice.

The British North America Act is the fundamental Law and defines with clearness the tenure of the judicial office. The Parliament of Canada has passed no Law in contravention of or trenching on this definition. A Local Legislature cannot confer on the Government of the Dominion power which the British North America Act or Canadian Parliament itself has not 5590 given. At page 54 Cooley says, "The constitution of the state is higher in "authority than law, direction or order made by any body or any officer "assuming to act under it. In any case of conflict the fundamental Law "must govern and the Act in conflict with it must be treated as of no legal "validity. The courts have thus devolved upon them the duty to pass "upon the Constitutional validity sometimes of Legislative and sometimes "of executive acts (55)."

In the notes at page 26, "It is idle to say that the authority of each "branch of the Government is defined and limited by the constitution if "there be not an independent power able and willing to enforce the limita- 5600 "tions. Experience proves that the Constitution is thoughtlessly but habi- "tually violated, and the sacrifice of individual rights is too remotely "connected with the objects and contests of the masses to attract their "attention. The judges ought to regulate their decisions by the funda- "mental laws rather than by those which are not fundamental."

Nor is it necessary, says he at pages 210 and 11, "That the Courts in "every case, before they can set aside a law as invalid, should be able to "find in the Constitution some specific inhibition which has been disregarded, "or some express command which has been disobeyed. Prohibitions are

“only important when they are in the nature of exceptions to a general 5610
 “grant of power, and if the authority to do an act has not been granted
 “by the sovereign to its Representative it cannot be necessary to prohibit
 “its being done.”

The British North America Act is the fundamental Law ; it gives power to the Governor General to appoint the Judges and to remove them from office on address of the Senate and House of Commons, but nowhere when once appointed without condition or limitation as to residence save that it be within the Province to which they may be appointed, does it give the power to order the Judges to change their residences to particular sections of that Province, at the dictation of the Local Legislature contrary to the 5620 terms of their Commission and the law under which their appointments were made. It was not necessary therefore to inhibit the exercise of such a power, for it never was granted. *A fortiori* where such change is in no way essential to the efficient discharge of the duties attached to the appointment. The privileges conferred by the British North America Act and the Dominion Legislature are statutory inducements. The power which confers, may remove, should public exigency demand, but that power has not yet spoken, and, should it do so, it will take care that the exercise of any authority it gives shall not work injustice.

In the case of *Calder vs. Bull* 3, Dallas, 390, Chase J., says “every law 5630
 “that takes away or impairs rights vested, agreeably to existing Laws, is
 “retrospective, and is generally unjust, and may be oppressive.”

Cooley at page 325, speaking of *ex-post facto* laws, says : “If it shall “subject an individual to a pecuniary penalty for an act which when “done involved no responsibility, or if it deprives a party of any valua-“ble right, like the right to follow a lawful calling, for acts which were “innocent or at least not punishable when committed, the law will be *ex-“post facto* in the Constitutional sense, notwithstanding it does not in “terms declare the acts to which the penalty is attached criminal.” Can there be any question that to drive a man from his house and home, 5640 selected, occupied and acquired in thorough accordance with existing law, is not depriving him of a valuable right, when no charge of a nature forfeiting that right is alleged against him ? The same author at pages 77 and 78 says. “The implications from the provisions of a constitution are some-“times exceedingly important, and have a large influence on its construc-“tion. One ‘rule of construction’ is, that when the constitution defines “the circumstances under which a right may be exercised or a penalty

"imposed, the specification is an implied prohibition against legislative interference to add to the condition or to extend the penalty to other cases."

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At page 138, after referring to powers specially conferred by the constitution upon the Governor or any other specified officer, he adds, "Other powers or duties the Executive cannot exercise, or assume except by Legislative authority, and the power which in its discretion it confers, it may also in its discretion withhold or confide to other hands," and in a note bearing on this point he quotes from an American case the following observations. "In deciding this question, as to the authority of the Governor recurrence must be had to the constitution; that furnishes the only rule by which the court can be governed. That is the Charter of the Governor's authority, all the powers delegated to him or in accordance 5660 with that Instrument he is entitled to exercise and none others." See also the Chief Justice's observations in *Valin vs. Langlois*, hereinbefore quoted, as to Statutory rights. Where then in the Constitution, the British North America Act, is any power of the character claimed given to the Governor-General? A power, it is contended, to be exercised at the instance of the Local Legislature, whether the movement, in the language of Mr. Justice Patterson, may "spring from caprice or from crude theories of political economy, or from any cause whatever, being a matter of speculation."

So strongly is this principle of the inviolability of the status of the 5670 Judges regarded under the Federal Government of the United States, that that Government never imposes, or permits to be imposed upon, the Judges once appointed by the Federal Government, any additional burdens or restrictions, without special legislation by Congress to that effect, and should it in view of paramount public interest do so, not without providing additional compensation, thus showing that in the American view, the constitution requires the presumed compact, resulting from the appointment, to be construed in the light of the existing law at the time of the appointment, and this has been the rule from the dawn of the Republic.

Vide Act of Congress, May 26, 1824, section 13, 4 United States Statutes 5680 at Large, page 56, relative to Federal Judge of Missouri;

Do. do. June 17, 1844, 5 do. 676, relative to Louisiana, Arkansas, Mississippi and Alabama;

Do. do. June 14, 1860, section 7, 12 Statutes do. page 35, relative to California.

It must, therefore, be considered that in Law no authority is given to the Dominion Ministry to advise the Governor General to order the Judges in British Columbia, or any one of them, holding his or their Commissions and appointments antecedent to the local Judicial District Act, 1879, to reside in any specially assigned District of the Province, and consequently any order to that effect made under such advice would be unconstitutional. 5690

A judgment to this effect was given in this Court in December last, in the case of *The Queen ex relatione the City of Victoria vs. Vieux Violand*, from which the counsel engaged declined to appeal.

As to this Judicial District Act, it may be urged, the Judges are interested, for, if legal, it affects their position and tenure of office. That objection, however, where all are concerned, cannot be sustained, for if so, the suitor would be denied access to any Court of competent jurisdiction in the Province. In such a case it is held that the hearing becomes a matter of 5700 necessity and is unimpeachable as if "An action were brought against all "the Judges of the Court of Common Pleas in a matter over which they "had exclusive jurisdiction." Per Lord Cranworth, C., *Ranger vs. Great Western Railway*, 5 House of Lords Cases, 88. See also Broom's Legal Maxims, Edn. 1874, and the cases there cited.

I think, therefore, that the objections taken by the learned counsel, Mr. Theodore Davie, for the plaintiff, must be sustained,—that the legislation restricting him from being heard is unconstitutional and void, and the Rules of Procedure alleged to have been promulgated by the Lieut.-Governor in Council for the governance of this Court are inoperative, and that this 5710 Court is bound in duty to exercise the authority it possesses to afford him an opportunity of bringing the plaintiff's case at as early a day as possible before the Court, in order to test the validity of the points raised by him at the trial of this cause. And I may add that the conclusions at which I have arrived have been materially confirmed by the fact that every conceivable and almost inconceivable argument has in a lengthy, most careful and able contention by the Attorney-General as *amicus curiae* been brought forward against such conclusions without any effect other than to strengthen them.

The following are the conclusions at which it may be briefly said the 5720 Chief Justice, Mr. Justice Crease and myself, who have heard and considered the argument, have arrived, (Mr. Justice McCreight, whose assistance would have been most valuable, having since July to May last been absent at Cariboo, and not having had any opportunity of conferring with his

brother Judges on the important legal questions constantly coming before the Court.)

1st. That the Supreme Court is not a Provincial court within the meaning of the 14 sub-section of section 92 of the British North America Act, 1867.

2nd. That the local Legislature has no control over its procedure, and **5730** cannot legislate so as to prevent suitors having access to that court, and having their causes heard, and carried on to final adjudication, so as to have an appeal to the Supreme Court of Canada.

3rd. That the local Legislature cannot itself make rules to govern the procedure of the Court or delegate the power to the Lieut -Governor in Council to do so.

4th. That the application of the Judicial District Act to Judges appointed and holding their commissions prior to its enactment is unconstitutional and void.

5th. That the Judges are Dominion, not Provincial officers.

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6th. That in these respects the Judicial District Act, the Better Administration of Justice Act, 1878, and the Local Administration of Justice Act, C. I., 1881, are *ultra vires*.

7th. That the plaintiff is entitled to have the relief asked for, and the court is bound in Law to hear his motion, and permit him to proceed with his cause.

The Hon. GEO. A. WALKEM, Q.C., Attorney-General, *amicus curiae*.

THEODORE DAVIE, Esq., Counsel for the Plaintiff.

MONTAGUE TYRWHITT DRAKE and CHARLES EDWARD POOLEY, Esqs., of Counsel for Defendants.

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JAMES CHARLES PREVOST, Esq., Registrar.



